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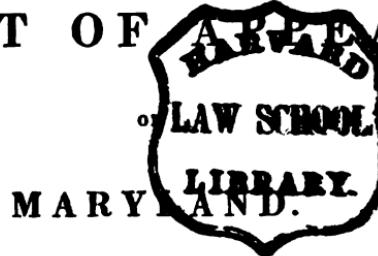
# MARYLAND REPORTS,

CONTAINING

CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS



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BY OLIVER MILLER.

ATTORNEY AT LAW, AND  
STATE REPORTER.

---

VOL. XII.

CONTAINING CASES IN DECEMBER TERM, 1857, JUNE AND  
DECEMBER TERMS, 1858.

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1859.

Rec Apr. 4. 1859

NAMES OF THE JUDGES,  
DURING THE PERIOD COMPRISED IN THIS VOLUME.

---

OF THE COURT OF APPEALS.

HON. JOHN CARROLL LE GRAND, Chief Justice.  
HON. JOHN BOWERS ECCLESTON, Associate Justice.  
HON. WILLIAM HALLAM TUCK, Associate Justice.  
HON. JAMES LAWRENCE BARTOL, Associate Justice,

OF THE CIRCUIT COURTS.

FIRST JUDICIAL CIRCUIT.—*St. Marys, Charles and Prince Georges* counties.  
HON. PETER W. CRAIN.

SECOND JUDICIAL CIRCUIT.—*Anne Arundel, Howard, Calvert and Montgomery* counties.  
HON. NICHOLAS BREWER.

THIRD JUDICIAL CIRCUIT.—*Frederick and Carroll* counties.  
HON. MADISON NELSON.

FOURTH JUDICIAL CIRCUIT.—*Washington and Allegany* counties.  
HON. THOMAS PERRY.

SIXTH JUDICIAL CIRCUIT.—*Baltimore, Harford and Cecil* counties.  
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EIGHTH JUDICIAL CIRCUIT.—*Dorchester, Somerset and Worcester* counties.  
HON. THOMAS A. SPENCE.

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OF THE CIRCUIT COURT FOR BALTIMORE CITY.  
HON. WILLIAM GEORGE KREBS.

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# MARYLAND REPORTS.

DECEMBER TERM, 1857.

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## JAMES T. PARSONS *vs.* GEORGE W. HUGHES.

A Court of Equity will, upon a bill filed by the mortgagee, either *before* or *after* default made by the mortgagor, interpose by injunction to prevent waste or destruction, by the mortgagor in possession, of the mortgaged property, whether real or personal.

APPEAL from the Circuit Court for Baltimore city.

The bill in this case, filed on the 9th of March 1857, by the appellee against the appellant, alleges, that the complainant became surety of Parsons, and on the 8th of October 1855, united with him in confessing a judgment in favor of the parties to whom the debt was due, to be released on payment of \$245 in six months, and of \$244.85 in twelve months, with interest on each sum from the date of the judgment; that on the 14th of January 1856, Parsons executed to the complainant, in order to indemnify him on account of his suretship, a bill of sale of all his stock in trade, furniture and fixtures in a certain shop in Baltimore city, and all book-accounts or other *choses in action* belonging to him, the said Parsons, upon the terms and conditions therein mentioned, a copy of which is filed with the bill as an exhibit; that Parsons has made default in paying the judgment according to its terms, and the complainant has been compelled to pay the same, and has received no reimbursement therefor from Parsons, except the sum of about \$110. The bill further charges, that at the time this bill of sale was executed, the property therein embraced was worth (as complainant supposes) about \$400, and the book-accounts, *choses in action* and other debts due Parsons, likewise mentioned therein, about \$900; that for the last twelve

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Parsons vs. Hughes.

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or eighteen months, Parsons has become irregular in his habits and inattentive to his business, which is now greatly reduced; that the aforesaid stock in trade, fixtures, &c., has been so much reduced as not to be worth more than (as complainant supposes) \$50; that for the last six or twelve months, Parsons has been, with all practicable speed and means, collecting the book-accounts and reducing the *choses in action* aforesaid into possession, without handing the same, or any part thereof, over to complainant; that the acts of said Parsons, in collecting the accounts and *choses in action*, and putting the proceeds into his own pocket, as above set forth, are in fraud of the complainant's rights; that under the terms of the aforesaid bill of sale, the complainant is entitled to a new bill of sale of all the goods and chattels, stock in trade, book-accounts and *choses in action* of which the said Parsons may now be possessed; that said Parsons is now, and for some time past has been, using his best exertions to obtain the money for all said accounts, *choses in action*, &c., and is about to sell out the remnant of the aforesaid stock in trade, and is actually removing the same, with the fraudulent intent to appropriate the whole proceeds thereof to his own use, and thereby deprive the complainant of his rights and remedies under the bill of sale last mentioned, all of which is a gross fraud upon him; that said Parsons has no other property or effects than that mentioned in the bill of sale, and is utterly insolvent; that the whole of said property and effects, if obtained by the complainant, would not pay more than sixty or seventy per cent. of his claim, and that if Parsons knew that complainant was about to proceed against him, he would secrete said property and books, and collect the debits thereon due him at large discounts, so as the more entirely to perpetrate the fraud he now contemplates. Inasmuch, therefore, as the complainant is remediless in the premises at common law, and entitled to relief only in a court of equity, where matters of this and the like sort are properly cognizable, the bill prays for an answer under oath, for the appointment of a receiver to take charge of the property, and for an injunction restraining Parsons from selling or in any manner disposing of any of the goods and

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Parsons vs. Hughes.

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chattels, stock in trade, book-accounts or *chooses in action* aforesaid, and from collecting, receiving or assigning any of the book-accounts, *chooses in action*, or other debts due him aforesaid.

The bill of sale or mortgage from Parsons to Hughes, filed with the bill, and dated the 14th of January 1856, recites, that "whereas said Hughes and Parsons did, on the 8th of October 1855, confess judgment to," &c., "for the sum of \$489.85, as by reference to the judgment docket of the Court of Common Pleas will appear; and whereas the aforesaid sum of \$489.85 was the individual debt of the said Parsons and the said Hughes the surety for the payment thereof; and whereas the said Parsons, in order to indemnify and save harmless him, the said Hughes, from and against all loss or damage that may happen to or befall him, by reason of his said suretysip or confession of the judgment aforesaid, doth hereby acknowledge himself bound unto the said Hughes in the penal sum of \$500, to be paid in two equal instalments in twelve and eighteen months from this date." The deed then, in consideration of the premises, and of one dollar, current money, proceeds to convey to Hughes, his executors, &c., "all stock in trade, furniture and fixtures, or other goods and chattels now in and about the house or shop at No. 119 Broadway, in said city, as well as all book-accounts now standing in the business books of the said Parsons, or other *chooses in action* at present belonging to him. And the said Parsons, in order more effectually to secure the said Hughes against all loss in the manner aforesaid, doth hereby, for himself, his executors, administrators and assigns, covenant with the said Hughes, his executors, administrators and assigns, that he or they, upon being so requested, will give him or them a new bill of sale of and for all such goods and chattels, stock in trade, book-accounts and *chooses in action*, as he or they may at the time be possessed of, or in any manner entitled to, similar in all its terms and conditions to these presents, so that this indenture shall or will give to the said Hughes a continual equitable lien upon the said goods and chattels, book-accounts and *chooses in action*, for the purposes of indemnity as afore-

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Parsons *vs.* Hughes.

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said. These presents are, however, made upon this condition, that if the said Parsons do pay the judgment aforesaid, and shall save harmless the said Hughes from all loss that may happen to or befall him, by reason of his having confessed said judgment, or become security as aforesaid, then this indenture becomes void, otherwise to remain in full force and virtue."

A copy of the judgment was also filed, as an exhibit, with the bill. The court (KREBS, J.,) granted the injunction as prayed, and the defendant, having filed his answer, entered a motion to dissolve the injunction, and afterwards appealed from the order granting it.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

*Thomas J. Warrington* and *William J. Stone* for the appellant:

1st. The bill discloses a case of a party claiming an indebtedness in virtue of a bill of sale or mortgage of personal property. It is evident that, as mortgagee, he was entitled to the possession of the property upon demand made, and had Parsons refused to deliver it, he could have recovered the stock in trade by replevin. That was his legal and *sufficient* remedy, for had he pursued it, the stock in trade, which is alleged in the bill to be worth more than the debt, could have been recovered. And as to the book-accounts and *chases in action*, there was also a *legal remedy* by attachment. The law is clear, that an *injunction* will not be granted where there is any other sufficient remedy either at law or in equity. There is nothing in the relation of mortgagee and mortgagor to prevent an action at law, (2 *Greenleaf's Rep.*, 173, *Smith vs. Goodwin*,) and in all such cases there is no relief in equity, and especially not by injunction.

2nd. But the allegations of the bill do not make a case for an injunction. In the case of personal property, the necessity must be *imperative* and *extraordinary*, to justify interference by injunction. 2 *Story's Eq.*, secs. 26, 27. In view of the

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Patents vs. Hughes.

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rulings in the cases of *Uhl vs. Dillon*, 10 *Md. Rep.*, 500, and *Warfield vs. Owens*, 4 *Gill*, 382, this injunction should not have been granted. The allegations of the bill in *Uhl vs. Dillon*, were quite as strong and very much like those in the present case, and yet the injunction was refused.

*L. M. Reynolds* for the appellee:

In determining whether the order granting this injunction was properly or improperly passed, this court is confined to the *bill* alone, (10 *Md. Rep.*, 418, *McCann vs. Taylor*,) and its allegations make a clear case for an injunction. In the case of *Brown vs. Stewart*, 1 *Md. Ch. Dec.*, 87, the chancellor decided, that if a mortgagor in possession of personal property is committing waste or destruction, equity will restrain him by *injunction*; that because the mortgagee may take possession of the property, or recover it by an action of replevin, he is not, on this account, precluded from the right of having it protected in a Court of Equity, and that a mortgagee may pursue his remedy at law and *in equity* at the same time.

*Tuck*, J., delivered the opinion of this court.

This is an appeal from an order granting an injunction, and must be determined on the bill, without reference to the answer. *McCann vs. Taylor*, 10 *Md. Rep.*, 429.

Upon carefully considering the averments of the bill, which on this hearing must be taken as true, we are of opinion that the order was properly granted. It is unnecessary to multiply authorities on the question of the court's power to interfere by injunction to prevent waste or destruction of property covered by mortgagee. It has been frequently exercised, and was recognized in *Clagett vs. Salmon*, 5 *G. & J.*, 314, where the bill was filed before the mortgagee was entitled to proceed to recover the debt. The same principle applies after default made by the debtor, for the mortgagee is not bound to take possession of the property by process at law. He may elect to prosecute his remedy *in equity*, and the debtor ought not to complain of being restrained from impairing the security which is held by his creditor. The subject was before the late chan-

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Baugher & Orendorf, vs. Culler.

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cellor, in a case where real and personal property were both conveyed by mortgage, and the debtor was selling and misaplying the personality. *Brown vs. Stewart*, 1 Md. Ch. Dec., 87. Concurring in the views there expressed, we are willing to rest our affirmance of the present order on the chancellor's opinion.

*Order affirmed and cause remanded.*

(Decided June 2nd, 1858.)

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### Jos. BAUGHER & SAMUEL ORENDORF, vs. HENRY CULLER.

Two parties *jointly liable* on a contract were sued, and one of them was taken and the other returned *non est*: HELD, that the *latter* was a *competent witness* for the *plaintiff*, to prove the terms of the contract.

APPEAL from the Circuit Court for Frederick county.

*Assumpsit* brought on the 15th of December 1854, by the appellants against the appellee and Geo. H. Buckey, partners, trading under the firm of Culler & Buckey. The appellee was summoned and Buckey returned *non est*. The declaration counts upon an agreement by which Culler & Buckey stipulated that if the plaintiffs would forbear to sue them for a debt until the 1st of February 1849, they would pay the plaintiffs any counsel fees and commissions which the plaintiffs should be obliged to pay to any attorney whom they might employ to collect the debt by suit or otherwise, provided said Culler & Buckey should pay the same before the said 1st of February 1849. To this declaration Culler appeared and pleaded *non assumpsit* and *actio non accrebit infra tres annos*.

1st Exception. The plaintiffs proved by competent testimony the contents of the agreement, which was in writing and had been lost, except that the witness could not fix the period of forbearance; they also proved its execution by the defendant and Buckey in their firm name, and also the breach

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Baugher & Orendorf, *vs.* Culler.

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of the agreement. It was admitted that, at the time of the trial, the partnership between Culler and Buckey was dissolved. The plaintiffs then offered to prove by Buckey the contents of the agreement, and that the period of forbearance, which was not recollected by the other witness, was to be until the 1st of February 1849, that the agreement was signed by witness with the name of the firm, by the express direction of Culler, and that the plaintiffs forbore to sue, according to the agreement. The defendant objected to the competency of Buckey as a witness, which objection the court (NELSON, J.,) sustained, and to this ruling the plaintiffs excepted.

*2nd Exception.* The defendant then asked the court to instruct the jury that under the pleadings and evidence in this cause, the plaintiffs are not entitled to recover, because of a variance in the contract alleged in their declaration, and the evidence in the cause, which instruction the court gave, and to this ruling the plaintiffs excepted, and the verdict and judgment being against them, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*Wm. P. Maudsby* for the appellants:

The ground of objection to the competency of Buckey is not shown by the record, but it could only have been that of interest. The rule on this point is well defined to be, that a witness is incompetent only in the case where he has a legal, certain and immediate interest in the event of the suit itself, or in the record, as an instrument of evidence in support of his own claim in a subsequent action. *4 Gill, 213, Crawford vs. Brooke.* *5 Md. Rep., 404, Funk's Lessee vs. Kincaid, et al.* The effect of the evidence of this witness would be against his own interests. He would subject himself to an action by his partner for contribution. The record could not be evidence in support of any claim to be thereafter set up by the witness. It would be evidence against himself in an action against him by Culler. No objection to the competency of a witness can be entertained, unless the party making

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Baugher & Orendorf, vs. Culler.

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it discloses, at the time, the ground on which the objection is based. *7 Md. Rep., 582, Pegg, et al., vs. Warford.* As to the *second exception*, it is insisted that though the evidence offered to the jury may have fallen short of the necessities of the case, yet so far as it went, there was no variance between the *allegata* and *probata*. For these reasons it is submitted there was error in the judgment below. →

No counsel appeared for the appellee.

BARTOL, J., delivered the opinion of this court.

This suit was originally instituted by the appellants against the appellees and George H. Buckey, as partners, trading in the name of Culler & Buckey, on a contract alleged to have been made by the firm.

The appellee alone was summoned, Buckey being returned “*non est.*” In the progress of the cause, Buckey was called as a witness for the plaintiffs, for the purpose of proving the terms of the contract. The defendant objected to his competency, and the Circuit Court sustained the objection, and the question presented for our decision by the first bill of exceptions is, whether the said witness was properly excluded as incompetent.

No ground of objection to the competency of the witness is stated in the record, and the cause has not been argued in this court on behalf of the appellee.

It seems to us that the testimony ought to have been received. So far from being objectionable on the ground of interest, his evidence tended to charge himself; he was directly interested in defeating the action; for in the event of the plaintiffs’ recovery, the defendant would be entitled to contribution from the witness.

The case of *Blackett vs. Weir*, 5 *Barn. & Cress.*, 385, (11 *Eng. C. L. Rep.*.) is very analogous to this. That was an action of *assumpsit* for goods sold and delivered; the general issue was pleaded, a witness called by the plaintiff to prove the defendant’s liability, stated on his *voir dire* that he, the witness, was jointly liable; it was held by the Court of King’s Bench “that this did not render him incompetent.”

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See, also, *Hudson vs. Robinson*, 4 *Maule & Selw.*, 475, and *Worrell vs. Jones*, 7 *Bing. Rep.*, 395. This last case was cited with approbation by the Court of Appeals in 3 *Gill*, 436, as "containing the true and sound doctrine on this subject."

The second bill of exceptions is founded upon an instruction granted at the instance of the defendant, "that the plaintiffs were not entitled to recover, because of a *variance* between the contract alleged in the declaration and the evidence in the cause." As we have already decided that the testimony of George H. Buckey ought to have been admitted, it is not material to determine the propriety of the court's instruction, as the case stood without Buckey's evidence. Upon a careful examination of the record, and looking at the whole evidence, as given and offered, we have discovered no material variance between the *allegata* and *probata*.

*Judgment reversed and procedendo awarded.*

(Decided June 2nd, 1858.)

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## WILLIAM FERGUSSON and others, vs. WILLIAM T. BRENT.

In an action against a *common carrier*, it was proved that while the vessel was on her way down the Patapsco, a *heavy fog* arose, which induced the captain to make for North creek harbor, where there were many vessels safely moored at the time, and in approaching it he was at the helm with a look-out, who, as the vessel neared the entrance, notified him *there was a buoy*, whereupon he bore away, and the vessel struck upon a *rock*, about thirty yards from the *buoy*, and sunk, thereby damaging the plaintiff's goods. There was no *bill of lading*, and it was also proved that at low water a person standing on the vessel could see the *rock* under the water, which rippled over it. *HELD:*

That this was not an *act of God*, exonerating the carrier; the fact that a *buoy* was placed to indicate the dangerous spot, sufficiently shows that the existence of the *rock* was generally known, and it was the duty of the master to have known and avoided it.

*Private carriers* will be discharged by proof of loss by *inevitable accident*, but nothing will relieve the *common carrier* save an *act of God* or the public

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enemies, or that which arises from some event expressly provided for in the charter-party.

By an "act of God" is meant a natural necessity, which could not have been occasioned by the intervention of man, but which proceeds from physical causes alone, such as the violence of the winds or seas, lightning or other natural accident.

To relieve the carrier, the act of God must be the *direct* and *immediate* cause of the loss, and without which it would not have occurred; all circumstances produced by human agency must be excluded, so that if divers causes concur in the loss, the act of God being one, but not the *proximate* cause, it does not discharge the carrier.

The phrase, "perils of the sea," includes *something more* than is meant by "the act of God," such, for instance, as hidden obstructions in a river, newly placed there, and of a character that no human skill or foresight could have discovered and avoided.

APPEAL from the Circuit Court for Charles county.

This was an action *on the case* brought by the appellee on the 3rd of May 1855, against the appellants, to recover damages for injury to certain goods which the plaintiff placed on board the defendants' vessel, the schooner *Isabel*, to be transported from Baltimore to Port Tobacco, in Charles county. The declaration charges that the defendants were *common carriers*, and undertook to transport and deliver the goods safely and securely. The defendants pleaded *non assumpsit*, upon which issue was joined.

*1st Exception.* The plaintiff proved that the defendants were common carriers and joint owners of the *Isabel*, and that, on the 28th of March 1854, he shipped on board the same, at Baltimore, sundry goods, in good order, to be carried for freight from Baltimore to Port Tobacco, and there delivered to the plaintiff in like good order, and that the goods were not so delivered, but some four or five weeks afterwards were delivered to the agents of the plaintiff at Baltimore, and that they were damaged, while on board the vessel, to the extent of \$425.88.

The defendants then proved by *Button*, who was on board the schooner, that she left Baltimore on the 28th of March 1854, between 10 and 11 o'clock, A. M.; that it had been raining in the morning, but was clear when they started; that

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after proceeding on their way, below the fort, a dense fog arose, between 1 and 2 o'clock, P. M., and the captain then made for North Point creek, and in entering this creek the captain was at the helm, with one of the hands as a look-out, and one sounding by throwing the lead; that in entering the mouth of the creek, the look-out called to the captain that there was a buoy ahead, and to keep off; the course the vessel was then standing would have carried her over the buoy; that the captain immediately altered the course of the vessel, and about thirty yards from the buoy, struck on a rock and sunk. They further proved by *Lacey*, a hand on board the vessel, that it had been raining the morning she left Baltimore, but when they left it was fair, and there was nothing in the signs of the weather which would have prevented their leaving harbor; that there was a light breeze from north-north-east, which was a fair wind down the Patapsco, and the tide was ebb; that after they had proceeded on their voyage as far as Fort Carroll, it became calm, and a dense fog arose, between 1 and 3 o'clock, P. M.; that after a while a light breeze again sprung up, and the captain made for North creek harbor, the fog still continuing; that this harbor was on the route they were going, and the nearest harbor witness knew on said route, and that the wind was fair thereto; that in entering this harbor, about 4 o'clock, P. M., the captain was at the helm, and a look-out kept, and soundings made; that the look-out called out that there was a buoy ahead, and told the captain to keep off, which he did, and about thirty yards from and outside the buoy, the vessel struck on a rock and sunk; that this was a usual harbor for vessels to make when it was dangerous to remain out in the Patapsco, and that witness was not aware and never had heard of the existence of the rock; that a large number of vessels were in this creek for harbor at that time. Upon *cross-examination*, this witness stated that it was dark and raining and cloudy all the morning; that the *Isabel* started out with all sail spread, except the topsail and staysail, and that she went down through the fog without taking any of her sail in; that the rock upon which she was wrecked is at the mouth of North Point creek; that he does

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not know whether this creek has any channel or not, that its mouth is a mile and a half wide, and that in low water, standing upon the vessel, he could see the rock under the water, which rippled over it. The defendants further proved by Captain *Neale*, that he commanded a vessel which navigated the Patapsco about twenty-five years ago, and that he would consider North creek harbor a proper and usual harbor for a vessel to make which was caught in a fog below Fort Carroll, and that he did not know of the existence of any rock in the mouth of said creek. Upon *cross-examination*, witness stated that he did not know of such places as Hawkins' point or Curtis' creek, on the Patapsco; that he only navigated this river for two or three years, and did not remember much about it.

The plaintiff then proved by *R. H. Mitchell*, that the day the Isabel left Baltimore, it was foggy and raining all day, the fog was very thick between 3 and 4 o'clock, and it was foggy in the morning, and that he has seen vessels and steamboats pass over the flats on the side of Fort Carroll, where the flats lie. By Captain *Wm. A. Allston*, who was in the habit of navigating the Patapsco, that on the morning of the day the Isabel sailed, there was rain, but not much fog; it was a misting rain, such as usually precedes a fog; witness was in the Patuxent river at the time, about eighty miles from Baltimore, in command of his vessel, and about 9 or 10 o'clock in the morning, put into harbor, judging it would be bad weather, and not thinking it proper to venture upon the bay; that North Point creek is five or six miles from Fort Carroll, which fort is five or six miles from Baltimore; that Curtis' creek is about two or three miles above Fort Carroll, and from the fort to Curtis' creek, a north-east wind is a directly fair-wind. By Vivian *Brent*, that on the day the Isabel left, it was misty and foggy all day, and that he noticed the character of the weather in going to his office, about 9 or 10 o'clock in the morning, and particularly in going from his office to dinner, about 2 or 3 o'clock; that he remembers the day from hearing a few days after of the wreck of the Isabel, when he remarked at the time, that the captain should not have sailed on such a

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day; that he has seen large Boston schooners sailing on the side of Fort Carroll, upon which the flats are; that Curtis' creek is about two or three miles from Fort Carroll, and a good harbor between Fort Carroll and Baltimore; that there is a cove directly opposite the fort, into which schooners sometimes put, and he has seen small vessels lying there, and that a north-east wind is equally favorable in going up or down the Patapeco.

Upon all the evidence the defendants asked the court to instruct the jury, that if they find from the evidence that the goods of the plaintiff were placed by him on board the Isabel, as a common carrier, and were either lost or damaged while on board, the plaintiff is entitled to recover to the extent of the damages he proves he sustained, unless they find from the evidence that the accident by which the damage occurred was inevitable, happened without fault on the part of the carrier, and which no human prudence could have enabled him to avoid. This instruction the court (ROBERT FORD, Special Judge,) refused to give, and to this ruling the defendants excepted.

*2<sup>nd</sup> Exception.* Upon all the testimony the court instructed the jury, that if they believe from the evidence that the defendants are joint owners of a schooner and common carriers between Baltimore city and Charles county, and that the plaintiff shipped by the schooner of the defendants any goods and merchandise, in the port of Baltimore, to be transported to Charles county, and if the jury shall further find that such goods or merchandise, so shipped as aforesaid, (if they shall find the goods or merchandise were so shipped,) were, in the course of their transportation from Baltimore to Charles county, injured or damaged, the plaintiff is entitled to recover whatever the jury shall find, from the evidence, to be the extent of the damage so sustained, unless the jury shall further find that the loss or damage resulted from the direct and immediate act of God, without the intervention of any human agency. To this ruling the defendants excepted.

*3<sup>rd</sup> Exception.* The defendants, upon all the testimony, asked the court to instruct the jury that if they find, from the

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evidence, that the captain of the Isabel left Baltimore when there was nothing in the signs of the weather to threaten an interruption of his voyage, and that after proceeding upon his voyage below Fort Carroll, a dense fog suddenly sprung up, rendering it dangerous to proceed on his direct voyage, and that the harbor of North Point creek was a harbor deemed safe, and usually resorted to in such cases, and under the circumstances of his position, the harbor most convenient to be resorted to, and that in attempting to enter said harbor, the vessel struck upon a sunken rock, unknown to the captain and to pilots or persons carrying on navigation upon the river Patapsco, and that the damages to such goods resulted from striking on said rock, and that in entering or attempting to enter said creek, the captain used every precaution available to him to harbor his vessel safely, then the plaintiff is not entitled to recover. This instruction the court refused to grant, and to this ruling the defendants excepted, and the verdict and judgment being against them, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*Frank H. Stockett* for the appellants, argued:

1st. That the court below erred in refusing the instruction contained in the first exception. It is submitted that the evidence, as set out in this exception, shows conclusively that the loss was occasioned by running on a sunken rock, not known to the master, or to those generally navigating these waters, and by no fault or neglect on the part of the master, but was one of those accidents which are called "*inevitable*," and "*a casualty which no human prudence could foresee or provide against*." The principle of law, that the carrier in this case is responsible, unless the loss occurred by "*the act of God*," is not controverted. All the English cases, from *Coggs vs. Barnard*, to the present time, including that of *Fbrward vs. Pittard*, 1 Term Rep., 27, decide this, and nothing more. The American authorities have followed these cases, and it is for this court to decide what accidents come within this term,

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"act of God," and if the mischance in this case is one of them. The English decisions afford but little light as to the opinions of their courts on facts similar to those of the present case, but we have abundance of light from our own writers, and the courts of this country, and if the principles here laid down have somewhat relaxed the unbending rigidity of the English cases, it is submitted they are more consonant to the rules of equity and justice, better adapted to the spirit of our laws, and better calculated to promote the expanded wants and demands of our commercial marine. The case of *Smyrl vs. Nilon*, 2 *Bailey's Rep.*, 421, decides that a loss caused by the boat running on an unknown snag in the usual channel of the river, is referable to the act of God, and the carrier will be excused. This case was affirmed in the same State by that of *Fulkner, et al., vs. Wright, et al.*, *Rice's Rep.*, 107, decided in 1838, where the boat was lost by running on a concealed and unknown snag. In this latter case Judge Richardson, though differing with the other judges in some of the principles of law, says: "The rule of law is plain; if the boat was unavoidably sunk, and the cargo thereby lost, the carrier is excused." The case of *Williams, et al., vs. Grant, et al.*, 1 *Conn. Rep.*, 487, comes up to the very case now before this court, and decides that "a common carrier is liable, under the general acceptance, for all losses, except such as are occasioned by the act of God, the act of the public enemies, or the act or default of the bailor himself. The term, 'act of God,' comprehends all misfortunes and accidents arising from inevitable necessity, which human prudence could not see or prevent. The striking of a vessel upon a rock not generally known, and not actually known to the master, is *prima facie* an act of God, for which the carrier is not responsible." This case was decided in 1816, and the whole of the English and American cases then determined were considered and reviewed, and the principles here laid down, are those still recognized in the State where the decision was made, and in many other, if not all the States of the Union. The cases of *Gordon, et al., vs. Buchanan, et al.*, 5 *Yerger*, 71, and *Turney vs. Wilson*, 7 *Yerger*, 340, referred to by the appellee,

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decide the same principle, that the carrier is responsible for all losses not occasioned by the act of God, or the public enemies, but neither case defines what is meant by the act of God. Even the case of *McArthur vs. Sears*, 21 *Wend.*, 190, relied on by the appellee, is clearly within the same principle, that inevitable accident, without the intervention of man, excuses the carrier. In that case the boat was lost by pure human agency and human negligence, the act of God not being in the case at all; the loss was occasioned by want of the usual light from the light-house, which was *owing to neglect*, and the existence of a delusive light in the stranded vessel, which deceived the captain; both of these were human agencies, and not the *act of God*. The careful reading of that case will satisfy the court that no new principles were intended to be announced, nor the cases heretofore cited overruled, but that the judge who delivered the opinion of the court, agreed with the case of *Williams vs. Grant*, as to what accidents were to be considered as coming within the definition of "the act of God." See, also, 6 *Cowen*, 266, *Aymar vs. Astor*, and *Riley vs. Horne*, 5 *Bing.*, 217. The case of *Colt vs. McMechen*, 6 *Johns.*, 160, held that the failure of the wind excused the master from loss under circumstances much less strong than those of this case. So, also, *Elliott, et al., vs. Rossell, et al.*, 10 *Johns.*, 1, decided that "for all losses not arising from inevitable accidents, or such as could not be foreseen or prevented," the carrier was responsible. There the loss was occasioned by a rock not in the *regular channel*, and the *existence* of which was *known*, and the judge very properly held the carrier liable, but he also held that if the loss had arisen from extraordinary occurrences, such as winds, storms, &c., the carrier would have been brought within the exception.

These decisions are sufficient to show the enlightened views of the courts of this country on questions of loss similar to the present case. The elementary writers certainly sustain them. Chancellor Kent (3 *Kent*, 216,) lays down the rule, that carriers by water are liable as common carriers, in all the strictness and extent of the common law, unless the loss happens

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by means of one of the excepted perils, and which he defines to be such as do not happen by the intervention of man, nor are to be prevented by human prudence; and he then mentions some of the excepted cases, one of which is a *rock* or *sand-bar*. *Story on Bailments*, sec. 489, defines what is meant by "the act of God," to be "inevitable accident or casualty," and in sec. 492, he explains what casualty excuses the loss, and, also, in secs. 513, 514. In sec. 511, he refers to, and approves of, the law as laid down in *Williams vs. Grant*, and in sec. 516, the very case of loss by a sunken rock, not *generally known*, is attributed to the *act of God*. See, also, *Abbott on Shipping*, ch. 4, sec. 6. It is not denied but that the *onus* of proof rests on the carrier to show that the loss was within the excepted cases, under the expression, act of God, but if he proves that the loss was occasioned by one of those occurrences which are termed the acts of God, *prima facie* he discharges himself, and the *onus* that the alleged cause or agency would not have produced the loss without his negligence, is thrown upon the plaintiff. 4 *Binney*, 127, *Bell vs. Reed, et al.* 2 *Watts*, 114, *Hart vs. Allen, et al.* 8 *Watts*, 479, *Reed vs. Dick*. 3 *Mass.*, 481, *Putnam vs. Wood*. And in *Williams vs. Grant*, it is decided that the striking of a vessel upon a rock not *generally known*, and not *actually known to the master*, is *prima facie* an act of God, for which the carrier is not responsible. This is the present case, and the plaintiff has entirely failed to remove the *onus* thus thrown on him, by producing evidence of the carelessness, ignorance or omission of duty on the part of the master. The only case in this State having any bearing on the principles of law discussed in this cause, is that of *Boyle vs. McLaughlin*, 4 *H. & J.*, 291, relied on by the appellees as deciding this cause. A careful examination of that case will show that the law, as there laid down, applies very remotely to the facts of this, and can by no means be considered as conclusive of it. This is, in fact, a new case in this State, and it is for the court now, for the first time, to lay down the rules which shall hereafter govern cases of this kind, as to the liabilities of carriers for losses caused by inevitable accidents, and it is submitted that, in

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coming to their decision, they will rather lean to the opinions of the courts of this country than those of England, even if it can be shown the latter would exclude this from the excepted cases of losses.

2nd. That the court erred in granting the instruction contained in the second exception. 1st. It was wrong, in point of law, upon the authorities and reasons already referred to in the first exception. By it the judge directs the jury to find for the plaintiff, unless they shall find "that the loss or damage resulted from the *direct* and *immediate* act of God, without the intervention of any human agency." It is believed that no authority in this country can be found laying down any such strict rule of liability, and it has already been shown by numerous authorities, and especially by the case of *Williams vs. Grant*, that loss *consequential* upon the act of God, may be such as will excuse the carrier. It is true, the sunken rock was the direct act of God, but that it was not the immediate and necessary cause of the accident, for it may have stood there a thousand years before any vessel was wrecked on it. The loss of the vessel was merely the *consequence* of running on it. 2nd. This instruction was calculated to mislead the jury. All the authorities agree, that to excuse the carrier, the loss must be ascribed to the act of God, but the cases already referred to, show how these words are understood as meaning "inevitable accidents," and "casualties which no human foresight could anticipate, or human prudence avoid." All these excepted cases were, by the stringent terms of this instruction, excluded from the consideration of the jury, and they were not only permitted, but directed, to apply those words, "direct and immediate act of God," in their most literal and narrow acceptation, and were deprived of all power to consider the loss occasioned by the striking of the vessel on a sunken rock, in the usual channel, and unknown to the master, as within the excepted cases, or excusing the carrier. And by this instruction, the jury were also excluded from all consideration of the conduct of the master, whose skill or care, negligence or omission of duty, it is their exclusive province to judge of.  
10 Johns., 1, *Elliott et al., vs. Rossell, et al.* 6 Johns., 160,  
*Colt vs. McMechen.*

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3rd. That the court erred in rejecting the appellants' second prayer, which is the ground of the third exception. This prayer is more specific in its terms, and brings the case more directly within the American cases already referred to, than the prayer first offered, and the ruling of the court upon it cannot be sustained, but by overruling or disregarding the whole current and effect of these decisions. The prayer embodies the very principles decided in *Williams vs. Grant*, as to the sunken rock, unknown to the captain and pilots, or persons carrying on navigation on the river, bringing the present case much more within the class of excepted cases to excuse the carrier, than the one there decided. But it is said, there was no evidence to support many of the conclusions to which the prayer assumes the jury may come. A careful examination of the evidence will, it is thought, satisfy the court of the contrary. Again, it is said this prayer should not have been granted, because the appellants prove the harbor was a *safe one*, and that by the *act of the captain* the vessel was forced upon a rock in the entrance of this harbor, where there was a buoy to direct him, and warn him of the danger. That the harbor was a *safe one*, is certainly a part of the appellants' case, because they could not be excused, if the captain, in seeking to enter an *unsafe harbor*, had sunk the vessel. But that the vessel, by the act of the captain, was forced upon the rock, they certainly deny, and the proof is, that he used every precaution, but did not know of the existence of the rock; and they insist that the running of the vessel upon it, was an inevitable accident, which he could not see, or provide against. In the case in 2 *Bailey's Rep.*, 421, it was shown that the passage of the river was safe, and just previous to the accident to the boat in that case, another vessel had passed in safety, the lost boat not following the channel, but being nearer the shore, when the accident occurred; but the court said the loss was occasioned by an accident which could not have been foreseen, and being referable to the act of God, the carrier was excused. The appellants also deny that there was a buoy to direct the master, and warn him of the danger. On the contrary, in avoiding the danger pointed out by the buoy, the

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vessel was run on a hidden rock, which must be presumed (in the absence of proof to the contrary on the part of the plaintiff) to have been equally unknown to those who fixed the buoy, as to the master.

*Alex. B. Hagner and Alex. Randall* for the appellee:

1st. By the prayer contained in the first exception, the court was asked, in substance, to instruct the jury that if they found that the loss resulted from *inevitable accident*, they ought to find for the defendants. No such instruction has ever been given in any action against a common carrier, for injury to goods entrusted to his care. The law, as laid down in every decision and elementary work on bailments, is, that a common carrier is responsible for all accidents to goods entrusted to him for transportation, except such as arise from the act, 1st, of God; 2nd, of the public enemy; and 3rd, of the owner of the goods. The fault of the proposed instruction is, that under it, the jury were authorised to excuse the carrier, though there might be no evidence that the loss resulted from either of these causes. The books are full of cases in which the common carrier has been held responsible for losses from "inevitable accident." In *2 Greenl. on Ev.*, sec. 219, the position is thus stated: "It is ordinarily a good defence for a *private* carrier, that the loss was occasioned by *inevitable accident*, but a *common* carrier is responsible for all losses and damages, except those by the act of God, or by public enemies." It is competent for the court, in a proper case, to say that certain inevitable accidents, under the circumstances, should be considered as the act of God; or that the facts proved in the particular case, disclose a sufficient excuse for the carrier, under the law. But the proposed instruction is in neither of these forms, and is, in fact, an attempted repeal of the law, as it has been declared to be, ever since the time of *Henry VIII*. There may be inevitable accidents which could never be ascribed to the act of God, but are wholly attributable to human agency. It is true *some* inevitable accidents are said to be the result of the act of God, but it does not follow that *every* accident, which is inevitable, is of that character. Every loss

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resulting from the act of God, is produced by an inevitable accident, but it is by no means true that every inevitable accident constitutes the act of God. The carrier is exonerated, not because the accident causing the loss is *inevitable*, but because this inevitable accident is of such a peculiar character as to be considered the act of God. Nor will it avail the appellants to argue, on this point, that the facts set forth in the exception prove that the loss was, in fact, the result of the act of God. The question for the court to decide is, whether the proposed instruction correctly stated the law on the subject? If it did not, the opinion of the court below will be affirmed. In the case of *Murphy vs. Staton*, 3 *Munf.*, 239, the court had granted an instruction exonerating the carrier for a loss on the upper James river, upon the ground that the navigation was attended with so much danger that the loss might have happened, notwithstanding the utmost endeavors to prevent it, and although the captain may have possessed competent skill, used due diligence, and provided hands of sufficient strength and experience. This was, in fact, an instruction like that under examination; but it was reversed on appeal, and the decision of the Court of Appeals adopted, in the subsequent case of *Friend vs. Woods*, 6 *Grattan*, 189. The proposed instruction also speaks of the accident as being one "which no human prudence could avoid." The case of *Smyrl vs. Nilon*, 2 *Bailey*, 423, cited by the other side, seems to determine the impropriety of this part of the instruction. The judge says: "In the case of the *Steamboat Co. vs. Bason, Harp.*, 262, an exception is introduced, as additional to the act of God, or the enemies of the country, as where the loss could not be guarded against by human skill and prudence. This, however, is improperly stated as constituting another case of exemption. If it is not *actus Dei*, it cannot excuse."

2nd. We will next consider the *third* exception. We first object to the form of the proposed instruction contained in this exception, upon the ground that it was calculated to mislead the jury, by assuming there was proof before them upon several points, as to which there was no proof whatever. 1st. There is no evidence "that there was nothing in the signs of the

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weather, when the captain left Baltimore, *to threaten an interruption of the voyage.*" All the witnesses agree that the morning was rainy and misty, and two of them prove that the whole day was foggy, and unfit for the vessel to leave port. Nor does any witness say that the fog "*sprung up suddenly,*" as is expressed in the prayer. 2nd. There is no evidence that "North point harbor was the harbor *most convenient* to be resorted to, under the circumstances." It is proved that Curtis' creek harbor was three or four miles nearer, and that the wind was fair to it. 3rd. The prayer speaks of a *sunken* rock. It was proved that, at low water, the witness, standing on the vessel, could see the rock under the water, which *rippled* over it, and it is also proved that it was low water when the vessel struck. The rock was not, therefore, *sunken*, that is, *hidden*, at the time of the accident. In *Johnson vs. Friar*, 4 *Yerger*, 50, much stress was laid on the fact that no *ripple* was visible on the river, and that, therefore, the snag was to be considered as *sunken*. But, in this case, the ripple of the water was perceptible from the vessel. 4th. There is not the slightest proof that "*the captain, or pilots,*" did not know of the position of the rock. 5th. The prayer authorises the jury to find that the captain "*used every precaution available to him* to harbor his vessel safely." There is no proof what precautions were proper to be used, or how far they were available to him. There was no proof to show why he could not have consulted the minute charts of these waters, published by the Government, or why he could not have shortened sail in such a fog, or why he could not have taken the proper side of the buoy, which plainly warned him of his danger. These would seem to be the usual and necessary precautions, under the circumstances, and were not adopted by the captain.

But we object, *secondly*, that the facts enumerated in the prayer, even if the jury had been justified in finding them, do not present a case excusing the carriers. This leads us to consider what is the legal interpretation of the phrase, "*act of God,*" and whether the loss, in this case, should be attributed to that cause? It would seem, upon principle, to be a question of easy solution, for the phrase, by its very terms, excludes

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the idea of *human agency* in producing the result. In fact, all uncertainty as to its signification, is produced by confusing matters intrinsically distinct. No one can doubt, for example, that if a sound ship is destroyed by lightning, the cause of its destruction is the act of God; and, on the other hand, if the destruction is produced by the pilot steering her upon a well known rock, that it is not attributable to that cause. And yet it might be argued that the rock was placed there by the act of God, and that the accident occurred by his decree. But this is confounding matters quite distinct, and has been well termed a mahometan extension of the phrase in question. The confusion arises from not distinguishing between *post hoc* and *propter hoc*. It is condemned alike by the most ancient and most recent authorities. "It were infinite," says Lord Bacon, in *Maxims of the Law*, (*Law Tracts*, 35,) "for the law to judge the causes of causes, and of their impulsions on one another, and, therefore, it contenteth itself with the *immediate cause*, and judgeth of acts by that, without looking to any further degree." The true inquiry is, was the cause one "which could not happen by the intervention of man?" was it "produced immediately without the intervention of any human cause?" 1 *Term Rep.*, 27, *Forward vs. Pittard. Story on Bailments*, sec. 511. "By the act of God, is meant a *natural necessity* which could not have been occasioned by the intervention of man, but proceeds from *physical forces alone*, such as violence of winds, lightning, or other natural accident." 2 *Greenl. on Ev.*, sec. 219. In the note to *Coggs vs. Barnard*, 1 *Smith's Lead. Cases*, 43 *Law Lib.*, 180, 181, the phrase is thus defined: "The true notion of the exception is, those losses that are occasioned *exclusively by the violence of nature*, by that kind of force of the elements *which human ability could not have foreseen or prevented*, such as lightning, tornadoes," &c., "it certainly is restricted to the *act of nature*, and implies the entire exclusion of all *human agency*." "The principle that all *human agency* is to be excluded from creating or entering into the cause of mischief, in order that it may be deemed the *act of God*, shuts out those causes where the natural object in question is made a

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*cause of mischief solely by the act of the captain,* in bringing his vessel into that particular position *where alone* that natural object could cause mischief: in the cases in question, it was the act of the captain *that imparted to the natural objects* all the mischievous qualities that they possessed; for rocks, shores, currents, &c., are not, *by their own nature*, and *inherently*, agents of mischief, and causes of danger, as tempests, lightnings, &c., are; the danger, therefore, *sprang from human agency.*" This doctrine is quoted with approbation in *Fields vs. Woods*, 6 *Grattan*, 189, where it was held that the act of God, which excuses the carrier, must be a *direct* and *violent* act of nature. In that case, a carrier stranded his boat upon a bar recently formed in the ordinary channel of the river, of the existence of which all in charge of the boat were ignorant, and yet he was held liable, because by *human foresight* and *diligence*, the existence of the bar might have been ascertained and avoided. The same doctrine is recognised in *McArthur vs. Sears*, 21 *Wend.*, 190, where the accident was caused by the pilot mistaking a light on a stranded steamer, which had been wrecked *by a tempest*, for one on the shore, of which wreck the captain knew nothing, and the night, too, was snowy and unusually dark, causing the mistaking of the lights, and yet the court held that "there was such an admixture of human means as vitiated the defence" that the loss was the result of the act of God.

The appellants' counsel refers to several cases which, he contends, establish a less stringent rule as to the liability of carriers. Before examining these cases, we call the court's attention to the fact that, in this case, no "*bill of lading*" was offered by the captain, which always contains an exception of "*the perils of the sea*," or some equivalent expression. That these words, "*perils of the sea*," are of much broader compass than the words, "*act of God*," is established by the following authorities: 12 *Georgia*, 578, *Brown, et al., vs. Clayton*. 43 *Law Lib.*, 180. 6 *Grattan*, 192, *Friend vs. Woods*. *Rice's Rep.*, 116, *Faulkner vs. Wright*. 4 *Yerger*, 50, *Johnson vs. Friar*. 5 *Yerger*, 81, *Gordon vs. Buchanan*. 21 *Wend.*, 198, *McArthur vs. Sears*. There is one case in which a contrary

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opinion is announced, that of *Williams vs. Grant*, 1 Conn., 487, though not by the court. One of the judges, who delivers a separate opinion, asserts that such is not the law, but he stands alone, against all the authorities. That this view is correct, appears from the consideration that, under the terms "perils of the sea," losses from the accidental collision of ships, and from the sinking of the ship from a hole eaten into it by rats, are excepted. Of course such losses could not be ascribed to the act of God, or the public enemy, and the carrier would be held liable but for the bill of lading. In every case cited by the counsel on the other side, there was a bill of lading containing an exception of "the dangers of the sea," or its equivalent expression, and the passages quoted by him from the elementary writers, are extracted from sections which are treating of "the perils of the sea." As this expression is an additional exception in favor of the carrier, which does not exist in the present case, those authorities cannot control the court here, even if the facts were similar. But even in cases where a bill of lading was received, the courts have held the carrier liable upon a much stronger state of facts in extenuation than those of this case. 21 *Wend.*, 190. 1 *Murphy*, 417, *Williams vs. Branson*. 8 *Watts & Sergt.*, 44, *Whitesides vs. Russell*. In 7 *Yerger*, 340, *Turney vs. Wilson*, it is said, that "the boatman is liable, as a common carrier, for all losses not occasioned by the act of God, or the public enemy, but certain events may be provided against in the contract, and then the carrier will not be liable for them." In that case, the exception of "the dangers of the river," in the bill of lading, was held to exempt the carrier from loss resulting from all hidden obstructions in the river, as rocks, logs, &c., which could not be foreseen, or avoided by human prudence, &c., thus showing that losses from such obstructions would not excuse him under the defence of the act of God. Yet, in that case, he was held liable, because he did not show that the loss resulted from some cause which human skill and foresight could not avert. In a case of a bill of lading, the exception of "the perils of the sea," only excuses such losses as arise "from irresistible force, or some overwhelming power

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which cannot be guarded against by the ordinary exertion of human skill and prudence." *Story on Bailments*, sec. 512, a. It is impossible to deny that ordinary skill and prudence would have enabled the captain, in this case, to have avoided the rock. Other vessels had done so, and were safely moored in the creek, at the time; and if he had been acquainted with the channel, and skilled in his business, he could have entered it safely. Being ignorant of the navigation, his employers must pay the penalty. "A loss directly and immediately occasioned by the *ignorance* or *inattention* of the master or mariners, is not deemed a loss by the perils of the sea." *Story on Bailments*, secs. 512, a, 518. The presence of a buoy, placed by the United States' officers in a frequented harbor, and appropriately marked, was the fullest notice, to an experienced captain, of the presence of danger, and no master would be allowed to defend himself from responsibility by pleading his ignorance of a buoy which was apparent to all trading near the place. If he was ignorant in spite of this information, his employers must suffer for it. "If the situation of the rock is *generally known*, and the ship is not forced on it by tempests, &c., the loss is imputed to the fault of the master, whether it arises from not taking a pilot, or his own unskillfulness or ignorance." Though the rock may not have been known to the witness, Lacey, who was then, for aught that appears in the record, on his first voyage, nor to Captain Neale, twenty-five years before, still the placing of the buoy there had made it *universally known*. Suppose a light-house had been built upon it, and the captain, notwithstanding, had run against that, would the appellants be permitted to contend that the rock was not known to persons navigating the river? The buoy is to serve the same purpose. If he had lost the goods by running on the buoy, could he be excused upon pretense that its position was not known to persons navigating the river?

But apart from bills of lading, the cases cited on the other side are distinguishable from this. That in 2 *Bailey*, was decided on the ground that the frequent freshets and continual changes of the rivers of that State, constituted an exceptional

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case, which could be guarded against by no human skill. The case of *Steamboat Co. vs. Bason*, places these cases upon the peculiar character of these rivers, and that such was the ground of the decision, is clear from the ruling of the same court, in *Ewart vs. Street, 2 Bailey*, 157, which sustains the strict rule of the common law, being a case not happening on a river of that State. The case of *Williams vs. Grant*, is overruled by all the later cases, and in terms by *McArthur vs. Sears*, and with entire propriety. The captain, in broad day, in fine weather, ran his vessel upon a rock so well known as to have received a particular name, and yet the court held him exempted, if the jury should believe he did not know of its existence. The Supreme Court of the State did not condemn this instruction as unqualifiedly as they should, but as it appeared that the vessel was out of the usual channel, that the master was ignorant of the navigation, and had no pilot on board, they held the verdict for the defendant wrong, and awarded a new trial, upon the ground that though the situation of the rock was unknown, yet "it did not appear but that the running of the vessel upon the rock, might be attributed to the negligence of the captain." They also held that the instruction was faulty, because it did not particularly call upon the jury to take into consideration the ignorance of the captain, the improper position of the vessel, &c. Upon this ground, the present instruction was equally faulty, and was properly rejected.

3rd. The appellants object to the instruction granted by the court in the second exception, because it was wrong in law, and on this point assert, that "loss consequential upon the act of God, may be such as will excuse the carrier." We submit that such a doctrine is at variance with all the authorities. In *Smith vs. Shepherd*, referred to in *Story on Bailments*, sec. 517, it was held, that the act of God, which would excuse the carrier, must be *immediate*, and *not remote*. So in the case referred to in sec. 519, the frost, the act of God, cracked the boilers, and the goods were injured by the escape of the steam; but it was held, that the connection between the frost and the injury was too remote to exempt the carrier. The case in 6

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*Grattan*, 192, declares that the act of God, which excuses the carrier, must be a *direct and violent act of nature*, implying the *entire exclusion of all human agency*. Such is the language of the court in *2 Bailey*, 157. See, also, 1 *Murphy*, 173, *Backhouse vs. Sneed*, and 43 *Law Lib.*, 180. The case of *Boyle vs. McLaughlin*, 4 *H. & J.*, 300, is full to the point. There the flour of the plaintiff was placed on a wharf by the carrier, and, while there, was damaged by a sudden rise in the creek, which, it was claimed, was the act of God. But the court held that the defendant should have removed the flour to a place of safety, that the loss was not occasioned *altogether* by the act of God, and, therefore, that the defendant was liable. "The carrier takes upon himself the knowledge and hazard of all the difficulties and perils of the route in which he proposes to go, except those proceeding *immediately and solely* from the act of God, or the enemies of the country," (page 302.) In that case the court instructed the jury that the defendants were chargeable, if they believe the loss was occasioned by the unskillful navigation of the vessel, or any other circumstance which could not be deemed the *immediate and distinct* act of God, or of the public enemy. That is the only reported case in Maryland upon the subject, and it is submitted that it contains the true exposition of the law, as in force in this State. In 1853, the subject was carefully considered in the case of *New Brunswick Steamboat Co. vs. Tiers, et al.*, 4 *Zabriskie*, 697. In that case, while the carrier's barge was moored at a wharf, a violent storm arose, which produced an unusually low tide, so that the barge was driven, by the wind, against a piece of timber which projected from the wharf, thirteen feet below the ordinary low water, the existence of which was unknown to the carrier, and this caused the loss. The court there say: "If divers causes concur in the loss, the act of God being one, but not the immediate or proximate cause, such act of God does not excuse the carrier; to have this effect, it must be one exclusive of human agency." The English law on the subject is set forth in the recent case of *Oakley, et al., vs. Portsmouth, &c., Steam Packet Co.*, 34 *Eng. Law & Eq. Rep.*, 530, which is very strong in our favor. In *Edwards on*

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*Bailments*; the whole doctrine for which we contend is adopted, and the 5th Edition of *Story on Bailments*, corrects the text of the former editions, wherever it tended to support the opposite theory. If the act of God combined with such act of man as could have been avoided, the carrier is liable. It may be true, the vessel would not have sunk but for the rock, but it is equally true, the rock would not have injured the vessel, if the captain had managed her properly. He set at naught every rule of prudence by his conduct in leaving harbor in foggy weather; in continuing under full sail in foggy weather; in neglecting to anchor near Fort Carroll, where, it is shown, he would have been safe; in having no chart of the river, or not consulting it, if he had; in not going into one of the nearer harbors, instead of this one, if he thought it necessary to leave the river; in not being careful to follow the direction of the buoy; and in almost every respect in which neglect could exhibit itself. Such is the case made by the record, and it seems irreconcileable with any other idea, except that he was resolved to reach the Potowmac as soon as possible, to get another load of freight, and was determined to *run the risk* of accident, in putting out in the then state of the weather.

The appellants' counsel also contends that this instruction had a tendency to mislead the jury, but we cannot perceive the force of the objection. The whole case was submitted to the jury, who were bound to consider all the evidence. If the question of the skill of the master was not brought before them with sufficient prominence, the fault was in the defendants, who should have introduced evidence establishing his competency to navigate a vessel in those waters. On the other hand, it is clear the jury would have been misled, if the judge had not pointed out, with precision, the description of accident which is considered by the law as exempting the carrier.

THE GRAND, C. J., delivered the opinion of this court.

This action was brought to recover damages for the injury which certain articles of property, belonging to the appellee, sustained, while on board the vessel of the appellants, on which they had been placed, for transportation from Baltimore

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city to Charles county, in this State. The appellants were common carriers, and, as such, received the goods of the appellee for transportation. The plaintiff proved the shipment, the amount of damage, and that on the day the vessel left the port of Baltimore, the weather, in the opinion of his witnesses, who testified to its character, was such that the captain ought not to have sailed. The defendants gave evidence to show that the weather was misty at the time when the vessel sailed, and that, during the day, a heavy fog arose, which induced the captain to make for North Point harbor; that in this harbor there were many vessels; that in approaching it, he was at the helm, with a look-out, who, as the vessel neared the entrance, notified him there was a buoy, whereupon he bore away, and struck upon a sunken rock, about thirty yards from the buoy, and there sinking the vessel, which occasioned the damage complained of. There was evidence, by different witnesses, showing there were other harbors nearer to the vessel, when she was put in the direction of North Point harbor, than that one, and, also, that the sunken rock was unknown to persons who had navigated the Patapsco river; and, also, that at low mark, the ripple of the water would enable a person standing on the deck to discover its locality. This, in substance, was the evidence in the cause, and, on it, the defendants asked the instructions of the court in the manner detailed in their prayers, but the court refused so to instruct the jury.

Before adverting to the language of these prayers, and to the instructions given by the court, we shall, as plainly as we can, point out the liability which a common carrier is under, for, on its ascertainment depends the propriety of the action of the Circuit Court in the premises.

There is no evidence in the record of a bill of lading, and, therefore, the responsibility of the appellants depends upon the law as applicable to common carriers, strictly as such.

There is a distinction in the law as applicable to *private* and *common* carriers. What we have to deal with in this case is, the law governing the liabilities of common carriers.

The cases in which this question has been considered, both

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in this country and in England, are almost without number; the leading ones being very fully commented upon in subsequent cases, and by all the approved commentators on the law of shipping. And it is agreed, on all hands, that nothing will relieve the common carrier but an act of God, or the public enemies; or that which arises from some event expressly provided for in the charter-party. It is difficult exactly to define, in all cases, what is an act of God. "By the act of God, is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone; such as the violence of the winds or seas, lightning, or other natural accident;" per *Ld. Mansfield, in Frward vs. Pittard, 1 Term Rep., 27.* 2 Greenl. on Ev., sec. 219. This definition is about as accurate and specific as, perhaps, any that could be given. It excludes all circumstances produced by human agency, so that if divers causes concur in the loss, the act of God being one, but not the proximate cause, it does not discharge the carrier. To relieve him, the act of God must be the immediate cause of the loss, and without which it would not have occurred. This is the law (in the absence of a contract to the contrary) applicable to *common carriers*; *private carriers* will be discharged by proof of loss by *inevitable accident*; but with this distinction we have nothing to do in this case, because here the defendants were common, and not private, carriers; besides which, there is no special contract exempting them from the operation of the general doctrine, which is rigorous, to the greatest degree, in its exactions upon the carrier. We, as a judicial tribunal, have nothing to do with its policy; our duty is to enforce it. We are, however, fully satisfied it is founded in good sense, and approved by the concurring experience of maritime nations.

In the case before the court, the exemption from liability can only be claimed, from the evidence, on the following grounds: 1st. That it was prudent and proper the vessel should have retired to North Point harbor. 2nd. That, in entering the mouth of that harbor, all care and skill possible were employed, by the master and crew, to guard against injury. And 3rd. That the rock on which the vessel was

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thrown, was concealed and unknown, so as to make the loss one occasioned by the act of God, or of inevitable accident. Unless these circumstances, if found by the jury, constitute a defence, then there was none. We have already said, that in the case of a *common carrier*, and in the absence of an agreement to the contrary, inevitable accident can have nothing to do with the case. The case of *Williams, et al., vs. Grant, et al.*, 1 Conn., 487, if susceptible of the construction placed upon it by the counsel of the appellants, we have only to remark, that, with a single exception, the case in 2 *Bailey, S. C. Rep.*, 421, it is opposed to all others of authority. But we think it can be reconciled with them. In the case in 1 Conn., the vessel, while on her passage, run against a rock, in Providence river, under a moderate breeze, in fair weather, and bilged, so that the salt on board was lost. The plaintiffs, the owners and shippers of the salt, proved the rock was well known, and that the vessel, when she run against it, was out of the usual course of navigation; and that there was no pilot on board, although it was usual to have one. The defendants, on their part, produced evidence to prove that the rock was not generally known. The court charged the jury, that if they should find, from the evidence, that the rock was generally known, the loss would be imputable to the negligence of the defendants, and they must return a verdict for the plaintiffs; but if they should find it was not generally known, then the loss was occasioned by a peril of the sea, and their verdict must be for the defendants. The jury found a verdict for the defendants, and a new trial, on the part of the plaintiffs, was moved for.

On the argument of this motion, which was granted, the court lay down—after asserting the broad doctrine to which we have referred, as governing this case—the principle controlling the one before them. Judge Swift, C. J., says: “If the rock on which the vessel was struck, *had been generally known*, then it was the duty of the master to *have known and avoided it*, and the loss would be imputable to his negligence. If the situation of the rock was not generally known, and the master did not actually know it, then, if he conducted properly in other respects, and no fault was imputable to him, his

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striking on the rock would be an act of God, an unavoidable accident, and he would not be liable for the loss." Judge Gould says: "It is very clear that a common carrier is liable, under a general acceptance, for all losses, except such as are occasioned by inevitable accident, the act of public enemies, or the act or default of the bailor himself." Again: "By 'dangers of the sea,' are meant no other than *inevitable* perils, or accidents, upon that element; and, by *such* perils or accidents, common carriers are *prima facie* excused, whether there is any such express exception or not." This last quotation from his opinion, is in relation to the words, "dangers of the sea," contained in the bill of lading.

It will be seen that both of the judges use the expression, "*inevitable accident*," as synonymous with that of "*act of God*." And, by affixing no other meaning to it, they assert no new principle, and, therefore, those opinions are to be read as though the words, "*act of God*," had been used instead of those employed, to convey the same idea. It is true, that every "*act of God*" is an inevitable accident, because no human agency can resist it; but, because it is so, it does not, therefore, follow, in the sense of the books, that every inevitable accident is an act of God. Damage done by lightning is an inevitable accident, and also an act of God, but the collision of two vessels, in the dark, is an inevitable accident, but not an act of God, such as the stroke of lightning, nor is it so considered by the authorities. Whether Judge Gould be correct, or otherwise, in his definition of the words, "*perils of the seas*," it is unimportant to inquire now, inasmuch as there is no bill of lading in this case, containing these words. His interpretation of them, however, is in conflict with the opinions of others. See the very full and discriminating note on common carriers, by Hare and Wallace, to the case of *Caggs vs. Bernard*, 1 *Smith's Leading Cases*, page 268, &c., edition of 1852, and particularly the case of *McArthur & Hurlbert, vs. Sears*, 21 *Wend.*, 190. In *Gordon vs. Buchanan*, 5 *Yerger*, 72, &c., the act of God, it is said, "means disasters with which the agency of man has nothing to do, such as lightning, tempests, and the like." "The perils of the sea" include some-

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thing more; "many disasters which would not come within the definition of the act of God, would fall within the exception. Such, for instance, as losses occasioned by hidden obstructions in the river, newly placed there, and of a character that human skill and foresight could not have discovered and avoided." In the note referred to, will be found many cases wherein is clearly pointed out the difference between the words, "act of God," and "perils of the sea."

In the case before us, the undisputed evidence was, that a buoy pointed out the locality of the rock, and that at low mark it could be seen by the ripple of the water over its surface. It is also proved, by the defendants, that several vessels were safely moored in the harbor, at the time of the loss. The fact that a buoy was placed to indicate the dangerous spot, is, in our judgment, sufficient to establish that the existence of the rock was "generally known," and, in the language of Swift, C. J., in the case cited, "*it was the duty of the master to have known and avoided it.*" We can perceive of no more effectual mode of making proclamation of the course of channels, the location of bars, rocks, and other impediments to navigation, than buoys; they are the means employed by all commercial nations, for the protection of human life, and the safety of commerce.

Having thus stated the law as ruling this case, we apply it to the prayers of the defendant, and to the instruction given by the court to the jury. The first prayer was properly rejected. It excuses the defendants, if the jury should find the loss was occasioned by *inevitable accident*, without fault on the part of the carrier, and which no human prudence could have enabled him to avoid, which we have shown, in the case of a *common carrier*, is insufficient. If it is not *actus Dei*, it cannot excuse. The second prayer is also defective in several particulars, but one of which need to be stated, namely, it is unsustained by the evidence. There is no proof that the sunken rock was unknown to "pilots carrying on navigation upon the Patapsco river." Captain Neale speaks of a period twenty-five years previously to the accident, and, in fact, shows, by his cross-examination, that he knew but little of the

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navigation of the river. As to the hands on board, their testimony shows they knew nothing of the other and more convenient harbors; but, above all, the buoy gave, or ought to have given, knowledge of the rock to the master, and he should have avoided it. We think the court gave the proper instruction, which, upon the jury finding the necessary facts, excused the defendants, only, if the jury should further find "the loss or damage resulted from the direct and immediate act of God, without the intervention of any human agency."

*Judgment affirmed.*

(Decided June 2nd, 1858.)

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## FARMERS AND MECHANICS BANK OF CARROLL COUNTY, AND JACOB MATHIAS, *vs.* BURGESS NELSON.

The board of directors of a bank passed a resolution directing the books for further subscription of stock to the bank to be opened, under the direction of M. and W., "or either of them, and that five dollars be required on each share, at the time of subscribing." N. proposed to subscribe for one hundred shares of stock, provided M. would undertake to raise the money therefor, upon a note for \$1000, he then held against certain parties, and not then due. To this proposition M. agreed, and, in accordance with this agreement, the subscription was made. HELD:

That, in taking the subscription in this manner, M. exceeded the authority conferred upon him by the resolution, and there being no proof that his act was ever ratified by the bank, N. is not entitled to a decree, compelling the bank to recognise him as a stockholder.

## APPEAL from the Equity Side of the Circuit Court for Carroll county.

The bill in this case was filed by the appellee, on the 2nd of April 1853, against the appellants, for the specific performance of an alleged contract of subscription for stock in the Farmers and Mechanics Bank of Carroll county, and for an account of the arrears of dividends thereon, and to compel

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Mathias to pay over the proceeds of a certain single bill to the bank, in payment of said stock, and the balance, if any, with interest, to the complainant.

The bill alleges, that on the 14th of October 1850, the bank, by its president and directors, opened books, in Westminster, for subscription of stock therein, a certain portion of its shares, exceeding two hundred, then and still remaining unsubscribed for; that complainant then and there subscribed for one hundred shares of stock, the books for subscription being then open, under the special superintendence of Mathias, the then and still president of the bank, and J. L. Warfield, then and still one of the directors thereof, as the agents of the bank, duly authorised to receive subscriptions for stock as aforesaid; that the transaction of said subscription was as follows: In the first place, complainant proposed to said Mathias and Warfield, in their capacity of agents for the bank, as aforesaid, to subscribe for one hundred shares of stock, provided they, as agents of the bank, and provided the bank, through and by them, as agents, would undertake to raise the money for said stock on a note, under seal, the complainant then held against Ward & Stocksdale, in favor of complainant, for \$1000, bearing interest from the 1st of April 1848, dated the 10th of October 1847, and payable the 1st of April 1850. To this proposition Mathias and Warfield, as agents as aforesaid of the bank, and the bank, by its said agents, then and there agreed, and complainant then and there, in compliance with this agreement thus made in writing, which writing is now in possession of the bank, and which it is prayed the bank may be required to produce, subscribed for one hundred shares of stock in said bank, and after said subscription was made, complainant handed to Mathias the aforementioned sealed note, and took a receipt for the same. The bill further alleges, that subsequently complainant received several letters from Mathias, which are filed as exhibits, in which the aforesaid agreement is not only recognised and acknowledged, but the precise terms thereof fully set forth, and, in one of them, Mathias acknowledges that, previous to the 7th of November 1850, he received \$60 on the aforesaid note, and placed the same to complain-

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ant's said subscription for stock on the books of the bank. It also alleges, that previous to the 5th of June 1851, the whole of said note was paid to Mathias, who has since been requested, by complainant, to appropriate the same to the payment of \$10 per share on the stock so as aforesaid subscribed for, that sum being all that the bank has called for on its shares, but that he refuses so to do, and the bank also denies that complainant is, or ever was, a stockholder therein, and refuses to issue to him the usual certificate of stock, and make the usual entries on its books.

The provisions of the *charter* of the bank, (act of 1849, ch. 268, passed the 27th of February 1850,) so far as necessary to be stated, are as follows: The first section provides that the capital stock shall consist of 12,000 shares, of \$25 each. The second enacts, that subscription books shall be opened, in Westminster and Uniontown, for 6000 shares in each place, under the direction of certain named *commissioners*, (Jacob Mathias being one, but not Warfield,) "or any *three or more of them*, on the first Monday of May next, and remain open *for two days*." The third provides, "that every subscriber shall pay to the *commissioner*, at the time of subscribing, the sum of *two dollars and a half, in specie*, on each share subscribed for, and the further sum of *two dollars and a half, in specie*, in sixty days thereafter, and the remaining twenty dollars on each share, to be paid at the said bank, as the board of directors may call for." By the fourth section, any stockholder who fails to pay his instalment of \$2.50, as above directed, forfeits, for the use of the company, all moneys paid by him antecedent to such failure. The fifth section provides, that the affairs of the bank shall be conducted by a president and ten directors, and that the directors shall be chosen by the stockholders, on the first Monday in June 1850, at Westminster, and yearly thereafter. The eighth section gives power to the board of directors to appoint a president and other officers, and also "to purchase, lease, rent or erect a proper building, in Westminster, for said bank, at the expense of the company." The ninth section forbids the bank to "deal or trade in any thing except bills of exchange, promis-

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sory notes, United States' stock, stock of the chartered banks, bullion, or the produce of their lands, or of such goods and effects as shall have been pledged or mortgaged to it by way of security, or conveyed to it in satisfaction of debts contracted in the course of its dealing, or purchased at sales upon judgments which shall have been obtained for such debts." The sixteenth section enacts, "that all persons who shall become subscribers to the said bank, their successors and assigns, shall be and are hereby made a corporation and body politic, by the name and style of the Farmers and Mechanics Bank of Carroll county, and by that name shall be and are hereby made able and capable, in law, to sue and be sued," &c., "to make and have a common seal," &c., "to make, issue and negotiate notes, and generally to do and execute such acts, matters and things as to them shall appertain, *under the clauses of this act.*" By the eighteenth section it is enacted, "that upon the payment, as hereinbefore provided, of the first and second instalment, in gold and silver coin, the president and directors *may commence the operations of the bank*, the facts of such payments having been so made, in gold and silver coin, having been first certified to the Treasurer of the State, by such person or persons as he may, upon request of the said president and directors, appoint to examine into, ascertain and report the said facts, but said bank shall *not go into operation* until said payments, in gold and silver coin, shall amount to \$30,000, *and such shares as remain unsubscribed for, the president and directors shall dispose of in such manner as they may deem most beneficial to the bank.*"

The answer of the bank, under its corporate seal, avers that it was to go into operation as a bank so soon as the provisions of the eighteenth section of its charter was complied with, and not before, and that these provisions were not fully complied with until after the 25th of January 1851, and the bank did not go into actual operation until after that day; that on the 15th of October 1850, the day that Mathias gave the receipt to complainant for the note or single bill for \$1000, for collection, the bank had not gone into operation as a bank, and had no power whatever to transact business as a corporation. It

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denies that Mathias and Warfield, or either of them, ever were appointed agents for the bank, to dispose of the shares of the stock unsubscribed for, as alleged in the bill. It also positively denies that the complainant ever did subscribe for one hundred or any other number of shares of stock in said bank, and pay for the same, in conformity with the third and fourth sections of its charter, and insists that if Warfield and Mathias, or either of them, ever did make any such contract as that stated in the bill, it is utterly null and void, as in direct violation of the several provisions of said charter. It further denies that Mathias and Warfield, as agents of the bank, ever made such a contract, or that any such contract, in writing, is or ever was in the bank, or the possession of its officers, or that the president and directors ever, in any way, authorised Mathias, as agent, to make any such contract with complainant, or any one else, and if, in fact, he made any such contract, he must have made it as an individual, and on his own account.

The *answer* of Mathias sets up the same defences as to the time the bank went into operation, and as to its power to transact business or make contracts by its president and directors, on the 14th of October 1850. It denies that he, as agent for the bank, ever made any such contract with complainant as that stated in the bill, or that he was ever appointed agent by the bank, to sell and dispose of the shares of stock remaining unsubscribed for at the time the bank went into operation, and avers he never had authority to sell and dispose of any shares of stock, except as one of the commissioners appointed by the second section of the charter, to open books and receive subscriptions, in strict accordance with the provisions thereof. He further states, that he received the note or single bill from the complainant to collect, as agent of the complainant, and not of the bank; that he acted as an individual, and the bank has no concern in the matter, and that he had no authority to act as president of the bank at the time he received the same for collection. He also denies that the complainant ever did subscribe for one hundred shares of stock on the books of the bank, and pay for the same, according to the provisions of the charter, or in any other way. He admits that, at the time he

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received this note or single bill for collection, he was anxious that complainant should become a subscriber for one hundred shares of stock in the bank, and to facilitate the collection of the money thereon, agreed to take it for collection, as agent of the complainant, and if the money could be collected before the bank went into actual operation as a corporation, respondent fully intended to have procured the subscription of the complainant for one hundred shares of stock, and to have applied \$1000 of the money in payment therefor, but he was unable to collect the money until about the 21st of May 1851, long after the bank went into operation, and when it was impossible to obtain any shares of stock therein, as the books for subscriptions were closed by the commissioners. The answer further states, that as soon as respondent collected the money, he apprised complainant of it, and offered to pay him the same, and has always since been ready and willing so to do.

The *proof*, on the part of the complainant, shows that, agreeably to the charter, the stockholders met, at Westminster, on the 3rd of June 1850, and elected ten directors, Mathias and Warfield being two of them, and that the directors met on the 10th of the same month, and chose Mathias president, and that on the 10th of August following, the board of directors met, Warfield being present, and passed the following resolution:

*"Resolved*, that on Monday and Tuesday, the 14th and 15th days of October, the books for the further subscription of stock to the bank be opened in Westminster and in Uniontown, under the direction of *Jacob Mathias* and *J. L. Warfield*, or either of them, at Westminster, and John Roberts and Jno. Smith, of J., or either of them, at Uniontown, and that five dollars be required on each share, at the time of subscribing. *Resolved*, that the foregoing resolution be published in the Carrolltonian and Democrat, county papers; that the president is hereby authorised to announce, in connection with the publication of the foregoing resolution, that the bank will go into operation immediately after the first day of January 1851."

In pursuance of this resolution, the publication in the papers was made, headed "*Bank Notice*," and signed by "*Jacob*

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*Mathias, President.*" The complainant's name appears, with others, as a subscriber for one hundred shares of stock, as of the 14th of October 1850, in a book, (Exhibit "S. B.,) which purports to be a subscription book for stock in the bank, and which the cashier of the bank proves was handed to him by Mathias, "*and is a list of a part of the stockholders.*" It was admitted that this list was *twice copied* into another book in the possession of the bank, and in each place the name of Burgess Nelson, the complainant, in the *handwriting of Mathias*, appears, with the others, as a subscriber for one hundred shares of stock. On the 19th of April 1851, the board of directors passed a resolution declaring the books for subscription closed, but authorising the president and directors, at their discretion, to dispose of shares of stock, not exceeding five thousand, to such persons as they deem proper.

It was admitted that all the prerequisites of the charter, as conditions precedent to the bank's going into operation, were fully complied with, previous to the 27th of January 1851, and that the bank did, in fact, go into operation, within the meaning of the 18th section of its charter, on that day, and that the number of shares subscribed for at the date of this admission, exclusive of those in controversy in this case, amount to six thousand six hundred. The complainant also offered in evidence a receipt signed by Mathias, dated the 14th of October 1850, acknowledging that he had received the note or single bill of Ward & Stocksdale, for \$1000, from the complainant, "*for collection,*" and also the two following letters from Mathias to him, which were also filed as exhibits with the bill:

"WESTMINSTER, 7th November, 1850.

BURGESS NELSON, Esqr.

*My Dear Sir:—A few days after you left your note with me, I addressed a letter to Mr. Ward, but heard nothing from him until yesterday, when he came, and I am sorry to say that things look rather unfavorably. He says he can't pay the money before next spring, and if your object was to pay your bank stock out of the proceeds of this note, it will produce some disappointment, because we certainly counted on*

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getting this money. Mr. Ward paid me sixty dollars on the note, for interest, which I placed to the credit of your stock, on the books of the bank. He did not appear to be willing to give his note for the balance of the interest, but said he thought he could pay it between now and the first of January. You will be so good as to inform me what order you will take in this matter.

Very respectfully yours, &c.,

JACOB MATHIAS."

"WESTMINSTER, 29th November 1850.

BURGESS NELSON, Esqr.

Dear Sir:—I received your letter of the 23rd instant, and am truly sorry to find that you came to the conclusion, after reading my letter, that there was some misunderstanding about your subscription for bank stock. I think, after you will have read this letter, you will not think so, for the transaction was a very simple and a very fair one. I will state it as I understood it: In the first place, you proposed to subscribe for one hundred shares of stock, and handed me a note against Ward & Stocksdale, drawn for \$1000, with considerable interest thereon, with the positive understanding that we were to collect the money due on the note, and apply \$1000 towards the payment of your stock in the bank, and the balance to be paid to you. Now, sir, if my letter to you was calculated to convey any other meaning, I did not intend that it should do so, and if the money is not paid just at the time the bank is put in operation, why we must only wait until it is paid, and you can lose nothing by it, for your note will be going on interest. I am very sorry to find, in the concluding part of your letter, that you speak of having no other means to resort to. Why, my dear sir, nobody dreamed that you should resort to any other means, and I do hope and trust that you will make yourself perfectly easy about this matter, for I am sure all will be right, and when this money is collected, it shall be honestly and faithfully applied according to agreement, and every cent that may be due you, after paying for your stock, shall be paid to you, without one cent of charge. I again say, I am too sorry to think that this transaction should have given you a

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moment's uneasiness, for I am sure all will be right, and I shall, at all times, take pleasure in apprising you of any movement in this matter.

I am, sir, very respectfully, your ob't servant,

JACOB MATHIAS."

Jacob Reese, the cashier, the only witness examined in the case, proves, in addition to what has already been stated, that he does not know whether the subscribers, before the commissioners appointed by the charter, paid in specie or in paper; deponent did not pay for his stock until the day the money was counted, the last Saturday in January 1851; a large portion of the cash payments for stock was in bank notes, and a large portion in gold and silver, and all of it was taken to Baltimore, before the bank went into operation, and invested, and when wanted, was drawn and brought to Westminster, and counted; deponent believes the note of Ward & Stocksdale, for \$1000, would have been good in Carroll county, on the 14th of October 1850, though he would not have advised the bank to discount it, because he considered them slow pay. On cross-examination, this witness proves, that, as cashier, he is the keeper of the books and records of the bank, and that there is nothing in said books and records showing that Jacob Mathias and J. L. Warfield were authorised by the bank to make any such contract as set forth in the bill of complaint in this cause; that Burgess Nelson's name appears upon the memorandum book, S. B., but we have in the bank a correct list of stockholders, in which the name of Burgess Nelson does not appear as a stockholder, and never has appeared as a stockholder in said bank, and he has never, nor has any one else for him, paid any money for stock in said bank, as appears by the books, or to deponent's knowledge.

The court below (NELSON, J.,) passed a decree declaring the agreement set out in the bill a valid one, and decreeing its specific performance as against the bank, and referred the case to the auditor, for an account of the dividends, and also directed Mathias to account for the principal and interest which he has received on the note, and to pay the balance over to the complainant. From this decree the defendants appealed.

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The cause was argued before LE GRAND, C. J., ECCLESTON,  
TUCK and BARTOL, J.

*Joseph M. Palmer* for the appellants, argued:

1st. That the court below most manifestly erred in passing a decree for the specific execution of the contract set forth in the bill in this case; for it is an admitted principle in all cases or contracts, both in a court of law and equity, that the *allegata* and *probata* must agree. The contract alleged in the bill, must be admitted by the answers, or proved by the complainant as alleged, before a specific execution can be decreed. 3 G. & J., 153, *Hoyle vs. Brewer*. 4 Md. Rep., 459, *Murdorff vs. Kilbourn*. 5 Md. Rep., 18, *Stoddert vs. Bowie*. The answers in this case, so far from admitting, deny most positively the written contract, or any other contract, like the one set forth in the bill. The respondents were called upon to answer the bill, the bank under its corporate seal, and Mathias under oath. The answers both deny the agency and the contract, as charged in the bill, and also that the complainant ever did make a contract with the bank, either in writing or by parol, by its agents or otherwise, in relation to the subscription for shares of stock in the bank, and it is a principle not to be successfully questioned, that the force of an answer responsive to the bill, can only be overcome or avoided by the contradictory testimony of two witnesses, or by the testimony of one, supported by pregnant circumstances. 4 Md. Rep., 36, *West vs. Flanagan*. The complainant offered but one witness to sustain the allegations of his bill, the cashier of the bank, whose testimony tends strongly to negative every allegation in it. Indeed, there is not a particle of evidence in the record to overcome the denials of the answers, and there is nothing, therefore, upon which the decree of the court can be sustained—nothing upon which it can rest with legal security.

2nd. But admitting, for the sake of the argument, that Mathias and Warfield, as agents of the bank, did make the agreement, as charged in the bill. Such an agreement was utterly null and void, under the provisions of the *third, ninth*

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and *eighteenth* sections of the bank charter. The bank, as a chartered institution, could not be bound by any such contract. The bank, as a corporation, had no existence until long after the making of the pretended contract. The corporation, it is presumed, could hardly make a binding contract before it had a legal existence—before it went into operation, by virtue of the 18th section of its charter. A contract like this, in relation to bartering away shares of its stock for bonds or single bills, is expressly prohibited by the 3rd and 9th sections of the charter. But, besides this, the resolution of the 10th of August 1850, in relation to the opening of books of subscription, required, by its terms, five dollars to be paid on each share *at the time of subscribing*, and neither Mathias nor Warfield had power to exceed to this authority, by making such a contract as this, and without the sanction or subsequent ratification of the bank, of which there is no evidence, it could not bind the corporation.

*Oliver Miller and Wm. P. Maulsby* for the appellee:

1st. The first question arising in the case is, whether the contract set out in the bill is sufficiently proved as against the denials of the answers, to authorise a decree for its specific execution. That the contract was, *in fact*, made between Mathias and the complainant, no one who reads the *letters* of the former, filed as exhibits with the bill, can, for a moment, doubt. But it is said, that the denials of the answers can only be overcome by the testimony of *two witnesses*, or of one, with pregnant circumstances. The answer of the *bank* does not put the complainant to this proof, for, being the answer of a corporation, under its corporate seal, it has no other effect as evidence than the answer of an *individual not under oath*. *8 Gill, 170, Md. & N. Y. Coal Co., vs. Wingert.* The answer of Mathias, however, is under oath, and conceding that its denials operate as evidence in favor of his co-defendant, the bank, we still insist that the rule of evidence referred to does not apply to this case. The rule of evidence, that the responsive denials of the answer can only be overcome by the testimony of *two witnesses*, or of one, with pregnant circum-

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stances, is not one of universal application. The rule applies to cases in which the facts denied depend on *oral* testimony, or *oral* and *circumstantial* evidence, and not to cases where the facts are conclusively proved by the *production* of the *written contract* of the parties, or where the defendant has *written letters*, which are exhibited with the bill, stating the contract, and admits these letters to be genuine, though in his answer he denies the contract. The case of *Jones vs. Bell*, 2 *Gill*, 106, fully sustains this view of the rule in question. The letters of Mathias, exhibited with the bill, and proved under the commission, conclusively establish the contract in the *precise terms* in which it is charged in the bill. It may also be remarked, that the answers are evasive, and are filled with *conclusions of law*, as to the effect and construction of the bank charter, rather than direct and positive denials.

2nd. Assuming, then, that the contract is sufficiently proved, the next question is, whether it is *binding upon the bank*? First, it is said the bank did not become a corporation, and had no power to make a contract, until the 27th of January 1851, when the provisions of the 18th section of its charter were complied with. The answer to this objection is, that though they could not *make discounts* and *issue notes* until \$30,000, in gold and silver, were paid in, as provided for in this 18th section of their charter, they could yet *do every other act* and make every other contract which the charter contemplates, as soon as they *accepted* that charter, and this acceptance was made on the *first Monday in June* 1850, as is evidenced by the then subscribers to the stock meeting and electing a *board of directors* and *president*. They then became a corporation, a body *politic*, by virtue of the 16th section of the charter, capable of making contracts, and of suing and being sued. They could elect officers, dispose of the unsubscribed for shares of stock, so as to complete the organization of the bank for *banking purposes*, and make contracts for the "purchase, lease, renting or erecting" a banking house, under the 8th section of the charter; in short, they could do any act, save those of *discounting* and *issuing notes*. *Angel & Ames on Corp.*, 69, 70. Again, it is said this contract violates the *third section* of

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the charter, which requires the payment on each share of \$2.50 *in specie, at the time of subscribing*. But, by *the terms* of this section, this restriction or requirement applies only to subscriptions taken *before the commissioners* appointed by the 2nd section. These commissioners had power to act *only for two days*, the first Monday and Tuesday in June 1850. Their powers *then ceased*, and all stock not subscribed for then, could only be disposed of under the last clause of the 18th section, which authorises the president and directors to sell and dispose of the shares remaining unsubscribed for "*in such manner as they may deem most beneficial to the bank;*" not requiring the payment of any amount whatever *in specie*. It was under this clause alone that the board of directors had power to pass the *resolution* of the 10th of August, authorising the books for further subscriptions to be opened on the 14th of October following, and it was under this clause and resolution that the subscription in controversy was made. It is, therefore, free from the restriction of *specie payment*, contained in the *third* section. It is true, this resolution requires the payment of *five dollars*, but not *in specie*, at the time of subscribing, and it is contended that taking the *note* in payment, was an excess of power on the part of *the agents* appointed by this resolution. It must be observed, in considering this objection, that the resolution does not require payment *in specie*, or, indeed, *in money*, and having paid what the agents agreed to receive *in payment*, having satisfied them by paying something else, which the agents agreed to receive as an equivalent for payment *in money*, the bank cannot be heard in a court of equity to set up this defence. 1 *Md. Ch. Dec.*, 395, *Elysville Manf. Co. vs. Okisko Co.* But even if it was an excess of power, it is still submitted that the bank had *notice of it*, and impliedly ratified the act. Mathias, one of these agents, was the then *president of the bank*, and Warfield, the other, one of *its directors*. The name of Nelson, as a subscriber, appears no less than *three times* upon the books of the bank, and Mathias says, in his letter, that \$60 of the money received as interest on the note, was placed to the credit of this subscription for stock on the books of the bank, and there is nothing to show

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that the bank ever disavowed the act, until after it had commenced to declare its dividends, which was long after the whole \$1000 had been received by Mathias on the note.

It is submitted, therefore, that the case is fully made out, and as there is no technical difficulty in the way of compelling a specific performance, it being admitted that there are over five thousand shares of stock still undisposed of by the bank, that the decree should be affirmed.

LE GRAND, C. J., delivered the following dissenting opinion:

The bill filed in this case had for its purpose the passage of a decree compelling the Farmers and Mechanics Bank of Carroll county to make the usual entries on its books, that the complainant was a stockholder of one hundred shares of stock in said bank, and to issue to the complainant the usual certificate to that effect, and to set forth an account of the arrears of dividends on said stock, and to pay said arrears to complainant, and that the defendant, Mathias, be decreed to pay over the proceeds of a certain single bill to the bank, in payment of said stock, and to pay over the balance, if any, together with all just and equitable interest, to the complainant, &c.

The theory of the bill is, that the complainant became a subscriber to the capital stock of the Farmers and Mechanics Bank of Carroll county, to the amount of one hundred shares, and that this subscription was made through the agency of the defendant, Mathias, the then president of the bank, and Jesse L. Warfield, then one of the directors thereof. The bill states the transaction of the alleged subscription to have been as follows: The complainant proposed to the said Mathias and Warfield, in their capacity of agents to the said bank, to subscribe for one hundred shares of stock, provided Mathias and Warfield, as agents of the bank, and provided the bank, through and by their said agents, would undertake to raise the money for said stock on a note the complainant then held against Jno. T. Ward and Solomon Stocksdale, under seal, in favor of complainant, for \$1000, bearing interest from the first day of April 1848, bearing date the 10th day of October 1847, and payable the 1st day of April 1850; that Mathias and Warfield, as agents

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of the bank, and the bank, by their said agents, agreed to this proposition, and, in compliance with this agreement, the subscription was made. The bank answered the bill, denying that the complainant was a subscriber, averring that the bank did not go into operation as a bank, with banking powers, until after the 25th day of January 1851; and, also, that Warfield and Mathias "never were, neither was either of them, appointed agents for the defendant, to dispose of the shares of stock unsubscribed for, as alleged by the complainant, in his said bill of complaint; but this defendant admits that the said Jesse D. Warfield and Jacob Mathias were commissioners appointed under and by virtue of the second section of said charter, with power, together with others, to open books of subscription for six thousand shares of stock in said bank, and that they, together with others, did open books of subscription at sundry times and places, as provided for in said second section of said charter, but this defendant positively denies that the said complainant, Burgess Nelson, ever did subscribe for one hundred shares of stock in said bank, or any other number of shares, and pay for the same in conformity with the third and fourth sections of said bank charter." The answer then proceeds to state several legal conclusions drawn from its construction of the provision of its charter, and then denies that it ever "in any way authorized Jacob Mathias, as agent, to make any contract or agreement with the complainant, or any one else, like the one set forth and charged in the bill."

The defendant, Mathias, denies positively that he ever made, as agent of the bank, any such contract as that set out in the bill of complaint, and also that the complainant is a stockholder in the bank.

These denials are sufficiently full to put the complainant to the proof of his case.

The answer of the bank, under its corporate seal, establishes nothing more than a denial of the allegations of the bill, it being only equivalent to the answer of an individual, not sworn to. *8 Gill, 170, Md. & N. Y. Coal Co., vs. Wingert.* The answer of Mathias, although it emphatically denies the agreement and subscription alleged in the bill, is not such a denial,

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under the circumstances of this case, as to require two witnesses, or one, with strong pregnant circumstances, to overcome it. Although the rule, in the general, appertains to the denial of the defendant, there is, nevertheless, a class of cases wherein it is not observed, and this, in my judgment, is such a one.

In the case of *Jones vs. Belt*, 2 Gill, 106, the court held, that where a complainant alleged the existence of a contract with the defendant, accompanied with collateral circumstances, and called upon him not to state what the contract was, but to admit or deny the existence of the agreement and circumstances set forth, and the defendant, in his answer, averred another agreement, and denied the collateral circumstances, the statement of the agreement by the defendant in such case is not *simply* responsive to the contract he was called on to admit or deny. It is not such a denial as requires two witnesses, or one, with concurring circumstances, to disapprove it; nor, in this case, was it necessary to disprove the denial of the collateral circumstances by the same amount of proof. And although, as was decided in *Powles, et al., vs. Dilley*, 9 Gill, 222, where a complainant calls upon a defendant to answer, he makes the latter a witness, and so far as the answer is responsive to the bill, it must be received against the complainant, and it cannot be excluded, because there is a co-defendant in whose favor it may and does consequentially operate; yet, in a case like this, the principle recognized in *Jones vs. Belt*, 2 Gill, 106, is not affected, but remains in full force. Here the answer of the bank merely puts the complainant to the proof of his case; and although the answer of the defendant, Mathias, under oath, is, so far as it is responsive to the bill, available to the bank, yet it is liable to be contradicted by proof of the contract, which proof may consist solely of its production and identification.

Keeping these principles in view, we are to inquire—1st, whether there was such a contract as that sought to be enforced? and 2nd, whether it was such a contract as it was competent to the bank to make, in the manner and under the circumstances detailed? These questions are to be answered

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by the evidence in the cause, and the terms of the act of incorporation.

There is no doubt that, to entitle a party to a decree for specific performance, his proof must correspond to the contract alleged. What, then, is the contract alleged in this case? It is, in substance, this: the complainant claims to be a subscriber to the capital stock of the bank, to the amount of one hundred shares, and that he made that subscription under the superintendence of the authorized agents of the bank, and that he made the stipulated payments by handing to one of those agents a single bill, which he agreed to collect and appropriate accordingly, and that he was returned as a subscriber to the number of one hundred shares. This contract is denied by the defendant, Mathias, and the question is, is the contract alleged by the complainant made out by the proof? I think it is.

I assume, for the present, that Mathias was the agent of the bank, and, if so, his acts, within the line of his agency, bind the bank. In his letter of the 20th of November 1850, addressed to the complainant, he says: "You (the complainant) then subscribed for one hundred shares of stock, and handed me a note against Ward and Stocksdale, drawn for \$1000, with considerable interest thereon, with the positive understanding that we were to collect the money due on the note, and apply \$1000 towards the payment of your stock in the bank, and the balance paid to you." Again, in the same letter, in allusion to some apprehension expressed by the complainant, he says: "I do hope and trust that you will make yourself perfectly easy about this matter, for I am sure all will be right, and when this money is collected, it shall be honestly and faithfully applied, according to agreement, and every cent that may be due you, after paying for your stock, shall be paid to you, without one cent of charge."

Jacob Reese testifies that exhibit S. B. was handed to him by the defendant, Mathias, and, by it, it appears Burgess Nelson is a subscriber to the amount of one hundred shares. It also appears, by the testimony of Mr. Reese, that in a book belonging to the bank, it appears, in the handwriting of Mr. Mathias, that Mr. Nelson, the complainant, was a subscriber

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for one hundred shares. If these acts were a legitimate exercise of authority on the part of Mr. Mathias, then it is clear Nelson was a subscriber.

By the minutes of proceedings of the bank, it appears that, on the 10th day of August 1850, the books for the further subscription of stock to the bank were authorized to be opened in Westminster and in Uniontown, under the direction of Jacob Mathias and J. L. Warfield, or either of them, at Westminster, &c.

It is under this resolution the complainant claims he has a right to regard Mathias as the agent of the bank to take subscriptions, and I think he is correct in his opinion. The 18th section of the act of incorporation expressly provides, that if there shall be any of the shares of the stock undisposed of and "unsubscribed for, the president and directors shall dispose of the same *in such manner as they may deem most beneficial for the bank.*" The authority given to commissioners, by the second section of the act, to receive subscriptions, has nothing to do with the case. The power conferred by it was to be exercised in the month of May 1850, and to exhaust itself in two days, the language being, they were to receive subscriptions "on the first Monday of May next, and remain open for two days." And, in the case of *Plank Road Co. vs. Hoffman*, 9 Md. Rep., 568, this court said: "Commissioners are appointed to receive subscriptions to stock for the purpose of giving the subscribers a right to organize as a corporation under a charter. So soon, however, as the organization takes place, the authority of the commissioners censes, and all corporate powers conferred by the charter, vest in the body politic. Such, at least, is the general rule applying in every case where there is no special provision to the contrary." It appears, by the agreement signed by the counsel for the complainant, and Mathias, as president of the bank, "that all the requisites of the charter, as conditions precedent to the bank's going into operation, and the president and directors commencing operations of the bank, were fully complied with previous to the 27th day of January 1851; and that the bank did, in fact, go into operation, within the meaning of the 18th section of the charter, on that day."

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It is contended by the defendants, that until after the 27th day of January 1851, the bank had no right to do any business, whatever, under its charter. This is obviously error. What is meant by the requirements of the 18th section, in this regard, is, that the corporation shall not be permitted to avail itself of the *franchise of banking*, in the manner pointed out by its charter, until it shall have first complied with them. It had, as a corporation, full power to do all acts preliminarily necessary to put the bank in operation, such as receiving subscriptions, providing suitable buildings, &c. It is to be presumed that when the Legislature passed the act of incorporation, it designed the bank should go into operation. Now, by the second section of the act, the commissioners therein designated had but two days allotted to them wherein to receive subscriptions, and, if the view advanced on behalf of the defendants were tenable, and the necessary amount of stock was not subscribed within those two days, the act would, in point of fact, be of no avail. The 18th section guards against such a state of things from mere abundance of caution, giving to the corporation the power to dispose of the unsubscribed shares "*in such manner as they may deem most beneficial for the bank.*" This power the corporation rightfully exercised in the passage of its resolution of the 10th of August 1851, and, inasmuch as it constituted the defendant, Mathias, its agent to receive subscriptions, his acts, in this regard, bind it.

I think, with all deference to others, that no one who reads the record in this case, ought to have a doubt that it was understood between Mathias and Nelson that he was a subscriber for one hundred shares. Indeed, the defence set up to the claim of the complainant is principally, if not entirely, technical. I discover no equity whatever in it, and, believing the complainant to have made out his case fully, am of opinion that the decree of the Circuit Court should be affirmed.

ECCLESTON, J., delivered the opinion of this court.

We are of opinion that the complainant in this case is not entitled to the relief which he seeks. Were it conceded that the corporation had the right to pass the resolutions of the 10th

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of August 1850, authorizing Messrs. Mathias and Warfield, or either of them, to receive additional subscriptions, in taking that of the complainant in the manner they did, they exceeded the authority conferred upon them, and there is no proof their act was ever ratified by the bank.

*Decree reversed and bill dismissed,*

*each party to pay his own costs.*

(Decided June 2nd, 1858.)

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### THOS. WILSON & Co., vs. THOS. J. CARSON & Co., Garnishees of E. WEBB, MAXCY & Co.

An order directing consignees "*when in funds from sales* of various shipments of bog product, to pay" certain named parties "the sum of \$10,000, *should the balance coming to us*" (the consignors) "*amount to that sum*," cannot defeat an attachment laid in the hands of the consignees, by creditors of the consignors, *before* the former had *accepted* the order, or in any way *assented* or *agreed to*, or *recognised* the appropriation of the fund to the specified purpose.

Where an order is drawn for the *whole* of a particular fund, it amounts to an *equitable assignment* of that fund, and, *after notice* to the drawee, it binds the fund in his hands.

But an order either on a general or particular fund, for a *part only*, is not an assignment of that part, nor does it give a *lien* thereon as against the drawee, until he *consents* to the appropriation by *accepting* the order, or an *obligation to accept* may be fairly implied from the custom of trade, or the course of business.

The testimony of two witnesses, (lawyers,) that they are of *opinion* a certain deed is, according to the laws of Kentucky, where it was executed, legal and sufficient to convey the property to the grantee, and that they know of no *statute* of that State affecting this *opinion*, is *sufficient proof* of the *foreign law*, and this being the only testimony on this point in the case, and the question being whether the deed should be admitted in evidence, the proof is *for the court*.

The recognition of the laws of another State in the administration of justice in this, is not a *right, stricti juris*, but depends entirely on *comity*, and in extending it, courts are always careful to see that the statutes or policy of their own States are not infringed, to the injury of their own citizens.

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The act of 1729, ch. 8, sec. 5, requiring conveyances of personal property, whereof the grantor remains in possession, to be recorded within twenty days in the county where the grantor resides, applies only to deeds made in Maryland, and not to those made in another State.

A deed of trust, for the benefit of creditors, executed in another State, in conformity with the laws thereof, though not executed, acknowledged or recorded in Maryland, transfers the title to personal property in Maryland so as to defeat an attachment subsequently sued out in this State by creditors of the grantor residing here.

**APPEAL** from the Superior Court of Baltimore city.

*Attachment* on warrant issued out of the Superior Court of Baltimore city, on the 3rd of January 1854, at the instance of the appellants, citizens of Maryland, on a claim due them by *E. Webb, Maxcy & Co.*, citizens of Kentucky, for \$4847.96, and, on the 4th of January 1854, laid in the hands of *T. J. Carson & Co.*, as garnishees, who appeared to the writ and pleaded *non assumpsit* and *nulla bona*, upon which issues were joined.

*Exception.* By the admissions and proof in the case, it appears that the plaintiffs were citizens of Maryland, that the garnishees, Thos. J. Carson, Jos. Carson and Saml. C. Edes constituted the firms of *T. J. Carson & Co.*, and *Carson & Edes*, the former doing business in Baltimore, and the latter in New York, and both firms being one concern; and that the defendants, Ezra Webb, Wm. Maxcy and Thos. G. Rowland constituted the firm of *E. Webb, Maxcy & Co.*, which did a general factorage, commission and brokerage business in Louisville, Kentucky, and all the members of this firm, together with Wm. Teeter and E. Lewis Stoll, composed the firm of *Teeter, Maxcy & Co.*, of Louisville, which pursued exclusively a slaughtering and pork-packing business, the *former* being the financial and shipping agents of the *latter* firm; that these two last mentioned firms failed in business, and, on the 31st of December 1853, all the members of both united in a deed of trust or assignment to Wm. Riddle, of Louisville, the provisions of which are as follows:

It conveys to the trustee a large amount of real estate in Kentucky, belonging to said Wm. Maxcy, individually, and his household and kitchen furniture; a considerable amount

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of real estate in Kentucky, belonging to said T. G. Rowland, individually, also certain slaves belonging to him, and his household and kitchen furniture; all the said Wm. Teeter's estate, real, personal and mixed; all the household and kitchen furniture of said E. Webb; certain real estate in Kentucky belonging to said E. Lewis Stoll, individually, and his interest in a certain tannery in Louisville; all the warehouse furniture of said E. Webb, Maxcy & Co., and the lease of the warehouse; all the accounts, debts, rights, *choses in action*, and personal property set out particularly in paper M., No. 1, made part of the deed; one hundred and sixty hogsheads of tobacco; all their interest in two hundred and seventy-two boxes of manufactured tobacco, shipped by E. Webb, Maxcy & Co., to Penn & Mitchell, of Baltimore, and for which the latter gave their acceptances; all the shipments of produce mentioned more particularly in said paper M., No. 1, and on the faith of which the acceptances of the consignees were given; all said Rowland's interest in the Farmers tobacco warehouse; and certain plank belonging to Teeter, Maxcy & Co.; *in trust* to sell and convey all said property, collect all the debts and *choses in action*, and out of the proceeds pay, *first*, the expenses of executing the trust, and for that purpose, the trustee may employ any agent or agents, and pay him or them a reasonable compensation; and *secondly*, to pay off the debts mentioned in a *schedule* also made part of the deed; and should there not be sufficient to pay all, then to pay them *pro rata*, with power to the trustee to sell and dispose of the effects so conveyed as he may deem proper, and most to the interest of the *cestui que trusts*; and also with full power and authority to compromise and compound, as he may think proper, any claim hereby conveyed. (This schedule of liabilities includes the debt for which the plaintiffs have attached, and an item of \$30,862.15, specified as due "Wm. Teeter, being balance due on account of purchase of hogs on account of the house.") The deed then declares that the transfer of the claim on Carson & Edes, and T. J. Carson & Co., and Lees & Walter, is subject to drafts and assignments theretofore given by the grantors—1st, to Gill, Anderson & Co.; 2nd, to Walters &

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Fox; 3rd, to Parmelee & Bro.; 4th, to Smith, Clark & Logan; and 5th, to B. & L. Leavell, and Conn & Ramsay. It then directs the trustees to defend certain attachments laid on a portion of the property conveyed, and then pending in the Louisville Chancery Court, and which the grantors deem to have been improperly issued, and if the plaintiffs therein should be successful, the trustee is to pay the claims attached for, and if unsuccessful, then said debts are to be paid *pro rata* with the others. The deed then explains that the item of \$30,862.15, rendered in the schedule of liabilities, is intended to cover claims and notes created by Wm. Teeter, for purchases for said firm, in and for some of which he has executed the notes of *Teeter, Maxcy & Co.*, which debts so created are designed to be secured by this deed, and the trustee is to pay the same with the other debts specified in the schedule.

The deed is executed by the grantors in their individual names, and by the two firms in their co-partnership names, and also by Riddle, the assignee, as an acceptance of the trust, and, on the same day, was recorded in Kentucky, but was never stamped nor recorded in Maryland, and no affidavit as to the consideration was made by the grantee.

The claim of the plaintiffs, on which the attachment issued, was admitted to be correct, and it was further admitted, that neither of the defendants was, at the time the attachment issued, a citizen of Maryland, nor did either of them then reside therein; that Jos. Carson, one of the garnishees, was in Madison, Indiana, at the end of the month of December 1853; that at the time the attachment issued and was laid, there was a large amount of produce, consisting of pork, lard, bacon, and other provisions, in the hands of the garnishees, *T. J. Carson & Co.*, in Baltimore, which had been consigned to them, for sale, by *E. Webb, Maxcy & Co.*, of Louisville, and that afterwards, and before pleas filed, there accrued from the sale of said property, in the hands of the garnishees, over and above all advances made by said firms of *T. J. Carson & Co.*, and *Carson & Edes*, the sum of \$12,805; that the property consigned as aforesaid, was parcel of that mentioned in paper M., No. 1, attached to the above deed; and that the property

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mentioned in said deed is inadequate to pay the creditors named in the schedule of liabilities thereto annexed.

The assignments of the proceeds of the property in the hands of *T. J. Carson & Co.*, and *Carson & Edes*, referred to in the deed, were made on the 30th of December 1853, the day before the deed was executed, and consist of six drafts or orders, two of which are signed by *E. Webb, Maxcy & Co.*, and the others by *Teeter, Maxcy & Co.* They are all directed to *T. J. Carson & Co.*, and *Carson & Edes*, with the exception of one, in favor of Gill, Anderson & Co., which is directed to *Carson & Bro.*, and, in reference to this, two witnesses, examined under the commission, swear that *notice* thereof was given to a man they call Joseph Carson, whose name the witnesses believe is T. J. Carson, at Madison, Indiana, on the 30th of December 1853. It was, however, admitted there was no such firm as *Carson & Bro.* The terms of these several orders are sufficiently stated in the opinion of this court, and their amount largely exceeds the funds now in the hands of the garnishees.

In reference to the validity of the deed of trust or assignment, according to the laws of Kentucky, the testimony of two witnesses was taken, under a commission sent to Louisville. Wm. S. Bodley, one of them, testifies that he is acquainted with the laws of Kentucky, and has obtained that knowledge by study and practice there and in Mississippi, since the year 1825, and by being a Circuit Judge in Mississippi a short time; that he has examined with care a copy of the deed in question, shown him, and the clauses and provisions in said deed appear to be, according to the law of Kentucky, legal and valid, and sufficient to convey to the grantee therein the property mentioned by the deed, and intended to be conveyed; that he knows of no statute of Kentucky affecting the correctness of the above opinion, or bearing upon that point, and that the common, customary or unwritten law of Kentucky, in relation thereto, is above stated correctly, as he believes. Hamilton Pope, the other witness, says, I am acquainted with the laws of Kentucky, being a practicing attorney; I have examined the copy of the deed in question, and am of opinion

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that the clauses and provisions therein are, according to the laws of Kentucky, legal and sufficient to convey to the grantee the property set forth therein; I know of no statute of Kentucky affecting the correctness of the above opinion, or bearing on the point; I was one of the counsel who advised and prepared the original deed.

Several letters were also read in evidence, by consent, for any purpose for which they are admissible, viz: 1st, one from Riddle, the assignee, dated Louisville, 31st of December 1853, directed to *Carson & Edes*, New York, advising them that *E. Webb, Maxcy & Co.*, and *Teeter, Maxcy & Co.*, had that day assigned to him, for the benefit of their creditors, all their estate, real, personal and mixed, debts, &c., and directing them (*Carson & Edes*) to take notice thereof, and to hold all property committed to either of their firms as subject to said assignment, and saying that a lien is recognised for advances made by them on the property consigned; 2nd, the reply of *Carson & Edes* to the above, dated New York, January 6th, 1854, directed to Riddle, saying that his letter of the 31st ult. came to hand this morning, (January 6th, 1854,) and also informing him that an attachment was laid, two or three days ago, against *E. Webb, Maxcy & Co.*, at the suit of T. J. Wilson & Co., of Baltimore, of the legality of which they know nothing, and further stating that some orders of *E. Webb, Maxcy & Co.*, to other parties, have also been advised, which they shall not, of course, accept; 3rd, a letter from the plaintiffs, T. J. Wilson & Co., dated Baltimore, January 4th, 1854, to *E. Webb, Maxcy & Co.*, in which the writers say, "we were yesterday surprised by a dispatch from Messrs. Hutchins & Co., which stated you have refused to accept our drafts, and have made an assignment," and also stating that they had attached the funds in the hands of *Carson & Edes*; and 4th, a letter from *T. J. Carson & Co.*, showing that the sales of the property attached, except a small amount, were made by the garnishees, after the attachment was laid.

The plaintiffs asked ten instructions to the jury, in substance as follows:

1st. This prayer asserts, that the deed of assignment of the

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31st of December 1851, is no bar to the plaintiffs' recovery against the garnishees, provided the jury find, from the evidence, that the plaintiffs never assented to it, and that Teeter and Stoll were members of the firm of *Teeter, Maxcy & Co.*, and not of that of *E. Webb, Maxcy & Co.*, and that the property and debts mentioned in the deed belonged, in part, to the firm of *E. Webb, Maxcy & Co.*, and that for a large amount of the debts mentioned in the schedule annexed to the deed, the firm of *E. Webb, Maxcy & Co.*, was not, in any manner, liable, and that William Teeter, mentioned in said schedule, is one of the grantors in the deed, and that the firm of *E. Webb, Maxcy & Co.*, were, at the date of the deed, in embarrassed circumstances, and unable to pay their debts in full, and that the provision made by the deed was, and is, inadequate for such payment, and that the deed was not stamped, and not acknowledged, and not recorded in any office in Maryland, in which deeds and bills of sale can be recorded, within twenty days after its date, and that no affidavit was made that the consideration set forth in the deed was true and *bona fide*, as therein set forth, and that no bond was ever given by Riddle, the trustee, or by any one else, conditioned for the faithful performance of the trust, and that no other person was ever appointed trustee in place of said Riddle; and that at the date of the deed, the property attached by the plaintiffs existed specifically and unsold in the hands of the garnishees in Baltimore, as the property of the defendants, except as to the amount mentioned in the letter of the garnishees, read in evidence by consent, and that the proceeds of any sales made prior to the laying of the attachment, were applied to the advances made by the garnishees, and that the sum of \$12,865, admitted to be in the hands of the garnishees, accrued entirely from sales made after the laying of the attachment, and that the garnishees had no notice of the existence of the deed until after the laying of this attachment; and that the plaintiffs were, and the defendants were not, at the time the attachment issued, citizens of Maryland, residing therein.

2nd. This prayer asserts that the paper marked No. 2, (which is one of the drafts or assignments in favor of Walters,

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mentioned in the deed, as subject to which the claim on the garnishees was transferred, and which is signed by *E. Webb, Maxcy & Co.*, and directs the garnishees to pay, out of the balance of the proceeds of certain specified shipments of hog product, when sold, after deducting advances of \$68,422.85, admitted to have been received from the garnishees, to Walters the sum of \$6853, the same being due him by *Teeter, Maxcy & Co.*, is not competent evidence to sustain the plea of *nulla bona* as to such part of the several articles therein specified, as remained in the hands of the garnishees, unsold at the time of laying the attachment, provided the jury find, from the evidence, that any part of said articles were, at the date of said paper, and at the time of laying the attachment, and at the time when the garnishees first received notice of the existence of the paper, in the hands of the garnishees, and that the advances of \$68,422.50, therein mentioned, had not, at any of said periods, been paid or satisfied in whole or in part, and that no means had been provided in any manner for payment or satisfaction thereof, except said shipments, and that the debt mentioned in said paper was the debt of *Teeter, Maxcy & Co.*, and not that of *E. Webb, Maxcy & Co.*, and that Teeter and Stoll were two of the members of the former, and were not members of the latter firm, and that said paper was never accepted by the garnishees, and was not presented to, or its contents made known to them, or either of them, before or at the time this attachment was laid.

3rd. This prayer asserts that the paper marked No. 3, (which is the assignment or draft in favor of Parmelee & Bro., referred to in the deed, and also set out in the opinion of this court,) is not competent evidence to sustain the plea of *nulla bona* as to such parts of the shipments therein referred to as remained in the hands of the garnishees, unsold at the time of laying the attachment, provided the jury find, from the evidence, that any part of said shipments were in the hands of the garnishees, in the city of Baltimore, at the date of said paper, and at the time of laying this attachment, and at the time the garnishees first had notice of the paper, and that the garnishees never accepted said paper, or assented to the direction therein

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contained, and were not notified of its existence or contents until after the laying of this attachment, and that the sum of \$10,000, therein mentioned, was not due by the defendants in this suit.

4th. That the following portion of the evidence of *Wm. S. Bodley*, viz: "the clauses and provisions in said deed appear to be, according to the law of Kentucky, legal and valid, and sufficient to convey to the grantee therein the property by said deed mentioned to be conveyed," is not legal and competent evidence to go to the jury.

5th. That so much of the evidence of said Bodley as is specified in the preceding prayer, is not sufficient evidence of what were the laws of Kentucky, as applicable to said deed.

6th. That the burden of proof is on the garnishees to prove, as facts, what are the laws of Kentucky, applicable to said deed, if they mean to contend that those laws, as applicable thereto, are other or different from the laws of Maryland.

7th. That said deed was not, and is not, a good and valid assignment or transfer of property which was in the hands of the garnishees at the time of laying this attachment, and that in the absence of proof that the laws of Kentucky, as applicable to it, are other or different from the laws of Maryland, it is to be assumed that the laws of Kentucky, as applicable thereto, are the same as the laws of Maryland.

8th. That the following portion of the evidence of Hamilton Pope, viz: "am of opinion that the clauses and provisions therein contained are, according to the laws of Kentucky, legal and sufficient to convey to the grantee the property set forth therein," is not competent and legal testimony to go to the jury.

9th. That so much of the testimony of said Pope as is recited in the preceding prayer, is not legal proof of what are the laws of Kentucky, applicable to said deed.

10th. That said deed was not, and is not, a good and valid assignment of so much of the property of the defendants, *E. Webb, Maxcy & Co.*, consigned by them to the garnishees, for sale, as remained unsold in the hands of the garnishees at the time of levying this attachment, and that said deed is not sufficient to sustain the issue joined on the plea of *nulla bona*.

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The court (FRICK, J.,) granted the *second, third and sixth* prayers, but rejected all the others, and decided that the testimony of Bodley and Pope, in relation to the law of Kentucky, was for the court, and not the jury, and that said testimony was legal and competent evidence, and accordingly instructed the jury that the clauses and provisions in said deed of trust were, according to the law of Kentucky, legal and valid, and, by such law, sufficient to convey to the grantee therein named the property by said deed mentioned to be conveyed.

The plaintiffs excepted to the ruling rejecting their several prayers, which were refused, and to the granting of the instruction so given by the court. The verdict and judgment were in favor of the garnishees, and the plaintiffs appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

*Wm. A. Talbott and Wm. Schley* for the appellants:

1st. The *orders* given on the 30th of December 1853, did not operate as a valid transfer of the property in the hands of the garnishees, so as to defeat the plaintiffs' attachment; for, 1st, only two of these orders were signed by *E. Webb, Maxcy & Co.*, the others were signed by *Teeter, Maxcy & Co.*; all of them are proved to have been for debts of the *latter firm*, and must be regarded as out of the case, for there is no evidence that the property in the hands of the garnishees belonged to *this firm*, and surely *E. Webb, Maxcy & Co.* could not, insolvent as they were, devote their money to pay *Teeter, Maxcy & Co.'s* debts; 2nd, but again, these orders are not an assignment of the *whole fund*, but only *orders* for a *part* of it, and therefore gave the parties holding them no *lien* on the fund until *assented* to by the consignees. In such cases the consignee must consent to the appropriation by an *acceptance* of the orders, or do some act *recognizing* the appropriation of the property consigned to him to the particular purposes specified in the orders; for, until then, the property and its proceeds remain at the risk and on account of the remitter or owner.

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5 Wheat., 286, *Mandeville vs. Welch*. 5 Pet., 601, *Tiernan, et al., vs. Jackson*. 10 Md. Rep., 373, *Eichelberger & Erskine, vs. Murdock*. 14 East., 582, *Williams vs. Everett*. 72 Law Lib., 232. There is no proof that the garnishees ever accepted, agreed to, or recognized the appropriations made by these orders, and these being thus out of the case, the only remaining defence is the deed of assignment to Riddle, and as to this we insist:

2nd. That the proof offered to support the deed as valid by the law of Kentucky, was not competent for such purpose, the witnesses, Pope and Bodley, giving merely their *opinions* as to its validity. The laws of a foreign country are to be proved *as facts*; the statute law by the production of a duly certified copy of the statute, and the common law by proof of experts. Now, when the statute is shown, the court *here* decides the *effect* of that law upon the case; so, if the common law is shown, the court *here* ought to decide as to *its* effect upon the case. The *opinion* of experts cannot deprive the suitor of his right to the judgment of the court, and *opinion* as to the validity of a paper, is not proof of the common law, any more than opinion as to a limited custom would be proof of the custom. Besides, if *opinion* given before the whole evidence is in, is to be proof, then, practically, all *other* evidence is shut out. 2 H. & J., 229, *De Sobry vs. De Laistre*. 3 G. & J., 242, *Trasher vs. Everhart*. Story's Conf. of Laws, secs. 637, 642. 7 Gill, 377, *Gardner vs. Lewis*. These witnesses, moreover, do not say that, by the law of Kentucky, this deed is good as *against creditors*, but only that it is good against the *grantors*, and would pass the property to the grantee, whereas it was incumbent on the garnishees to prove, by *legal* evidence, that the deed was valid as against creditors, *non-assenting* as well as assenting. (13 Mass., 147, *Ingraham vs. Geyer*. 5 Md. Rep., 44, *Cushwa vs. Cushwa*.) In this respect the proof here differs widely from that given as to the law of South Carolina, in the case of *Black, et al., vs. Zacharie & Co.*, 3 How., 487, 488.

3rd. That the property attached, being *in specie*, in the hands of the garnishees, in Maryland, at the time the attach-

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ment was laid, and the garnishees having so continued in possession, their possession was the possession of the defendants, and could only be changed either by *actual transfer* to an assignee, or by deed executed and recorded according to the law of Maryland, or *actual notice to the garnishees*. If considered as a *chose in action*, the title of the assignee was merely *inchoate* until *actual notice* to the *garnishees*, and the property in their hands, over and above their advances at the time of laying the attachment, was the property of *E. Webb, Maxcy & Co.*, and the plea of *nulla bona* was not sustained by proof of the assignment without *actual notice* to the *garnishees*, prior to the attachment. 3 *Barn. & Cress.*, 423, *Bentall, et al.*, vs. *Burn. Blackburn on Sale*, 223, 225, 230, in 57 *Law Lib. Cross on Lien*, 83, 84. 4 *Mees. & Wels.*, 791, *Bryans, et al., vs. Nix.* 77 *Eng. C. L. Rep.*, 743, *Watts & Wife, vs. Porter.* 3 *Russell*, 1, *Dearle vs. Hall.* 2 *Story's Eq.*, secs. 1042, 1043, 1047. 2 *Ross on Commercial Law*, 576, *Auld vs. Hall.* 3 *Day*, 376, *Woodbridge vs. Perkins.* 5 *Day*, 534, *Judah vs. Judd.* 16 *Verm.*, 579, *Whitney vs. Lynde.* 17 *Mass.*, 110, *Lanfear vs. Sumner.* 10 *Md. Rep.*, 379, *Eichelberger, et al., vs. Murdock.* There is no proof that these garnishees had *notice* of this deed of assignment prior to the attachment, but, on the contrary, the letter of *Carson & Edes*, of the 6th of January 1854, shows that they did not know of the assignment till that day, and, in this very letter, Riddle is informed that our attachments had been previously laid in their hands. But it is said, we had *notice* of this assignment prior to our attachment: we had, however, no *notice* of the terms of this particular deed. But suppose we had *notice*, how does that help the *title of Riddle*, the assignee? He must perfect his *title* by giving *notice* to the garnishees, and if we take the property before that is done, by legal process, our *title* must prevail, whether we knew of the assignment or not. At any rate, we never *assented* to the deed; *knowledge* is one thing, and *assent* another. 7 *Md. Rep.*, 296, *Glenn vs. Boston, &c., Glass Co.* Again, Riddle, the assignee, can only claim under the assignment; he cannot enlarge the power given him by the *deed*, and by that instru-

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ment the property in the hands of these garnishees is assigned, subject to advances, and to the *orders* above referred to. These orders, though not valid as against us, are still *good as against the parties* to the deed, and as they far exceed the balance in the hands of the garnishees, *nothing* on this claim was, therefore, conveyed by the deed to the trustee.

4th. That the deed is void, according to the law of Maryland, as against the appellants; 1st, because it attempts to convey all the property of *E. Webb, Maxcy & Co.*, the debtors of the appellants, for debts not owing by *that firm*, and so to appropriate the partnership effects to the wrong of the partnership creditors. It confuses and blends together the property of *two firms*, between whom there is no *privity*. It may well be that *E. Webb, Maxcy & Co.* were solvent as to their *partnership debts*, and yet we, who are *their* creditors, and have attached *their* property, are met with a deed which takes this property from them, and distributes it to the creditors of *Teeter, Maxcy & Co.* This cannot be done, and the deed is, for this reason, void. 1 *H. & G.*, 96, *McCulloh vs. Dashiell*. 2 *Coll. on Part.*, sec. 822, note. A partnership creditor attaching the partnership funds, is preferred to an attachment of a separate creditor of one of the partners. 1 *Gallison*, 367, *Lyndon vs. Gorham, et al.* 9 *Greenleaf's Rep.*, 28, *Commercial Bank vs. Wilkins*. 6 *Mass.*, 242, *Pierce vs. Jackson*. 22 *Pick.*, 450, *Allen vs. Wells*. 2nd. Because it contains various provisions which are denounced by the law of Maryland, as fraudulent *per se*, and others which were evidence to the jury, to show fraud *in fact*. It does not purport, on its face, to convey *all* the property of the firms, or of the individual partners; it authorizes the trustee to employ *agents*, and to *compound* claims as he may think fit, and *reserves to one of the grantors* a large amount; it has no stamp, no affidavit as to the consideration, and was never acknowledged nor recorded in Maryland, as required by the *act of 1729, ch. 8, sec. 5*.

5th. That though the deed may be valid by the law of Kentucky, and, by comity, might be held valid to pass the property attached, in the absence of express legislation here, yet, being opposed to *the policy* of the law of this State, and,

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as already shown, in violation of express statutes, it cannot avail against this attachment. The plaintiffs being citizens of Maryland, and the property attached being in Maryland, belonging to non-resident debtors, the courts here will not send them abroad to another jurisdiction for dividends, when they have the means of payment at home. 13 Mass., 146, *Ingraham vs. Geyer*. 17 Mass., 110, *Lanfear vs. Sumner*. 15 Pick., 11, *Fall River Iron Works Co., vs. Croade*. 5 Greenleaf's Rep., 245, *Fox vs. Adams, et al.* 23 Verm., 279, *Skiff vs. Solace*. 14 Martin, 93, in 2 Cond. *Louisiana Rep.*, 606, *Olivier vs. Townes*.

For these reasons it is insisted that the several rulings of the court below, excepted to, were erroneous, and the judgment should be reversed, and, as their claim is admitted to be correct, this court will enter judgment in favor of the appellants, without awarding a *procedendo*.

*Charles H. Wyatt* and *Geo. Wm. Brown* for the appellees:

1st. The orders of the 30th of December, were sufficient assignments of the fund in the hands of the garnishees. One of them, at least, was shown to Joseph Carson, one of the garnishees, on the day of its date, and they had, therefore, notice thereof before the attachment. The firm of *E. Webb, Maxcy & Co.*, were partners of *Teeter, Maxcy & Co.*, and liable for all the debts of the latter firm, and the orders were, therefore, properly given, signed by either firm. All these orders are expressly ratified by the deed of trust, which is signed by all the members of both firms, and this ratification is valid, even if the deed itself, for any reason, is not a valid assignment of the property which it professes to convey. In support of the position that these orders were valid and effectual assignments of this fund, so as to defeat the attachment, we refer to 2 Story's Eq., sec. 1047; 72 Law Lib., 229; 16 Pet., 106, *Tompkins vs. Wheeler*; 8 Wheat., 268, *Spring vs. South Carolina Ins. Co.*; 7 Pet., 608, *Brashear vs. West, et al.*; 26 Maine, 448, *Porter vs. Ballard*; 20 Verm., 25, *Blin vs. Pierce*; 3 Barb., 262, *Hoyt vs. Story*; 8 Humph., 654, *Johnson vs. Irby*; 4 Md. Rep., 316, *Crane vs. Gough*.

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But if these orders should not be held valid as against this attachment, we then rely upon the *deed of trust* or assignment of the 31st of December 1851, as a conclusive bar to it, and insist:

2nd. That the deed was valid, according to Maryland law. The partners of *E. Webb, Maxcy & Co.*, had a right to unite with the partners of *Teeter, Maxcy & Co.*, to pay the debts of both concerns, because the partners of the former were liable for all the debts of the latter firm, being partners thereof. There is no rule of law which prevents a debtor, in failing circumstances, from consolidating his property, individual and partnership, into a common fund, for the purpose of paying a certain class of debts. This is all *E. Webb, Maxcy & Co.* did. It does not appear that there were any individual debts due by any of the partners. If, in this way, they gave to the creditors of either firm a larger dividend than could have been derived from the assets of the particular firm, this is not an improper preference, but one which the law allows. But it does not appear that any such preferences were created by this deed. This deed, being thus valid if executed only by the partners of *E. Webb, Maxcy & Co.*, is certainly not made void by the fact that the other two partners of *Teeter, Maxcy & Co.* join in the conveyance, and throw their property into the common fund. If the appellants were creditors of *Teeter, Maxcy & Co.*, they might, with some appearance of reason, complain that *that* firm had united in a conveyance for the payment of the debts of both firms, because all the partners of *that* firm were not partners of the other. But they are creditors of *E. Webb, Maxcy & Co.*, and the deed secures none but debts for which that firm, in its partnership capacity, or all its members, as partners of *Teeter, Maxcy & Co.*, were responsible, and certainly this court cannot determine that such a deed was fraudulent as against such creditors. There is no *reservation* in it in favor of the *grantors*. It is true, Teeter's name appears as one of the creditors, but the deed itself explains this item, and shows that it was to pay the *debts* of the firm, created by Teeter, and not to *reserve* any of the property conveyed to either of the grantors. So far, therefore, as these

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objections are concerned, the deed would be valid if executed in Maryland, and by persons residing therein. 3 *Md. Rep.*, 11, *Green & Trammell, vs. Trieber*. *Ibid.*, 53, *Sangston vs. Gaither*. The objections, that the deed is not stamped, and not acknowledged and recorded in Maryland, within twenty days, according to the act of 1729, ch. 8, and that there is no affidavit as to its consideration, do not apply to a deed made in Kentucky, between parties there resident, and especially to a case where possession of the property conveyed was not sustained by the grantors. 1 *Md. Rep.*, 524, *Bryan vs. Hawthorne*. *Ibid.*, 474, *Waters vs. Dashiell*. But if Maryland law would condemn this deed, we then insist:

3rd. That the deed is fully and satisfactorily proved to be valid, according to the law of Kentucky. The statute law of a foreign State is to be proved by an exemplified copy of the law, and the customary or unwritten law, by *witnesses* who are *acquainted* with the law. This we have done by the two *witnesses*, Bodley and Pope, experienced practitioners of the law in that State, and who say they have examined the deed, and, in *their opinion*, it is valid. In no other way could *experts* testify. This evidence was also for the *court* and *not the jury*, in the absence of any *contradictory proof*, or proof that our *witnesses* were not entitled to credit. To sustain this position, that the law of Kentucky was properly proved, and that in this case the proof was for the *court*, and not the *jury*, we refer to 7 *Gill*, 377, *Gardner vs. Lewis*; 3 *G. & J.*, 243, *Trasher vs. Everhart*; 2 *H. & J.*, 219, *De Sobry vs. De Laistre*; 1 *Greenly on Ev.*, secs. 440, 486 to 488; *Story's Conflict of Laws*, secs. 637, 638, 642; 16 *Eng. C. L. Rep.*, 426, *Lacon vs. Higgins*; 61 *Eng. C. L. Rep.*, 268, *Cocks vs. Purday*; 6 *Foster*, 152, *Pickard vs. Bailey*; 12 *Verm.*, 396, *State vs. Rood*; 8 *Robinson*, 414, *United States vs. Bank of U. S.*; 55 *Eng. C. L. Rep.*, 208, *Baron De Bode's Case*.

4th. That being valid according to the law of Kentucky, and being made between persons there resident, the deed is valid to convey the personal property in Maryland, not being against the policy of our laws. We have already said, that it

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is not necessary that the deed should be recorded in Maryland within twenty days, according to the act of 1728, ch. 8, for it is very evident that that act only applies, and was only intended to apply, to deeds and bills of sale executed in Maryland, by persons residing therein; it does not pretend to invalidate a deed made in another State, between persons there resident, conveying, among other things, personal property in Maryland. This question seems to be conclusively settled by the case of *Houston vs. Nowland*, 7 G. & J., 480, where it was decided, that a deed executed in Delaware, in conformity with the laws of that State, though not valid to convey *real estate* in Maryland, without being executed, acknowledged and recorded, according to our laws, was yet effectual to convey personal property belonging to the grantor, including *chooses in action*, in Maryland. The cases of *Trasher vs. Everhart*, and *Gardner vs. Lewis*, already referred to, also decide that though the rule of comity is overruled by *positive law*, yet, in the absence of such positive law, it is a universal principle governing the judicial tribunals of all civilized countries, that the *lex loci contractus* controls the nature, construction, and *validity* of the contract. On this point, see, also, 18 Penn. State Rep., 185, *Law vs. Mills*; 6 Binney, 361, *Milne vs. Moreton*; 4 Johns. Ch. Rep., 469, 487, *Holmes vs. Remsen*; 5 Mason, 174, *Bholen, et al., vs. Cleveland, et al.*; 2 Bailey, 163, *Greene vs. Monory*; 8 Robinson, 262, *United States vs. Bank of U. S.*; 2 Wallace, Jr., 131, *Caskie vs. Webster*; 3 How., 514, *Black vs. Zacharie & Co.*; *Story's Conf. of Laws*, secs. 383, 384; all of which decide that personal property has no locality, but follows the *situs* of the *owner*, and that the law of the owner's domicil is to determine the validity of the transfer, or alienation thereof, unless there is some positive or customary law of the county, *where it is found*, to the contrary, and that a *general voluntary assignment*, valid by the laws of one State, though assumed to be void if it had been made in another, will carry property in that other against an attaching creditor there, and especially in a case where the *attaching creditors had notice*, as the appellants had here, of the assignment, at the time of their attachment.

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5th. The position taken by the other side, that the proceeds of the property, which remained specifically in the hands of the garnishees at the date of the attachment, and was subsequently sold by them, to reimburse themselves for their advances, are not conveyed by the deed, is not sustained by the authorities or the facts. The property was sold by the garnishees, to repay the advances made by their agreement, and the proceeds of sale are transferred by the deed, precisely as the property itself would be. The appellants, as shown by their letter, had notice of the assignment *before* they laid their attachment, but no such notice was necessary, for the deed was immediately operative on being assented to by the trustee, and operated instantaneously as a transfer of the property, so as to defeat an attachment subsequently issued and laid. *Story's Conf. of Laws*, sec. 396. *Hill on Trustees*, 83, 84, 448. 72 *Law Lib.*, 229. 6 *Watts & Sergt.*, 329, *Read vs. Robinson*. 4 *Barr.*, 274, *Seal vs. Duffy*. 13 *Penn. State Rep.*, 589, *Klapp vs. Shirk*. 11 *Wend.*, 241, *Cunningham vs. Freeborn*. 2 *Paige*, 311, *Keyes vs. Brush*. 2 *Green's Ch. Rep.*, 84, *Scull vs. Reeves, et al.* *Burrill on Assignments*, 280, 282, 321.

For these reasons, without urging other specific objections to several of the prayers, it is submitted that the rulings excepted to are correct, and that the judgment should be affirmed.

J. E. GRAND, C. J., delivered the opinion of this court.

This is an attachment on warrant, which, on the 3rd day of January 1854, issued out of the Superior Court of Baltimore city, at the suit of Thomas Wilson & Co., against the effects of Ezra Webb, Wm. Maxcy and Thomas G. Rowland, copartners, trading under the firm of E. Webb, Maxcy & Co., to recover a balance on account due 26th of November 1853, of \$4847.96. On the 4th day of January 1854, the attachment was laid in the hands of the garnishees. The garnishees pleaded *non assumpsit* and *nulla bona*. All the members of the firm of *Webb, Maxcy & Co.*, together with William Teeter and E. Lewis Stoll, composed the firm of Teeter, Maxcy & Co., of Louisville, but neither Teeter nor E. Lewis Stoll were of the firm of E. Webb, Maxcy & Co. Both firms failed in

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business, and, on the 31st day of December 1853, all the members of both firms united in a deed of trust to William Riddle, of Louisville, conveying a large amount of real estate in Kentucky, belonging to William Maxcy, individually, also his household and kitchen furniture; a considerable amount of real estate in Kentucky, belonging to T. G. Rowland, also certain personal property also belonging to him, individually; all the estate of Wm. Teeter, real, personal and mixed; certain property, real and personal, belonging to E. Lewis Stoll; the warehouse furniture of E. Webb, Maxcy & Co.; also certain accounts, debts, rights, *choses in action*, and personal property set out in paper marked M., No. 1, which is made part of the deed. This paper specifies the lard, pork, &c., which had been shipped to T. J. Carson & Co., of Baltimore. This conveyance was one in trust for the benefit of creditors, after paying certain expenses, according to the order specified in it. It provides that the transfer, in the deed, of the claim on Carson & Edes, and T. J. Carson & Co., and Lees & Walter, is subject to drafts and assignments by the grantors, previously given: 1st, to Gill, Anderson & Co.; 2nd, to Walters & Fox; 3rd, to Parmelee & Bro.; 4th, to Smith, Clark & Logan; and 5th, to B. & L. Leavell, and Conn & Ramsay.

It was admitted that neither of the defendants were citizens of Maryland at the time of the issuing of the attachment, nor were they at the date of the execution of the deed of trust of the 31st day of December 1853. It was also admitted, that at the time the attachment issued and was laid, there was a large amount of property, consisting of pork, lard, bacon, and other provisions, in the hands of Thomas J. Carson & Co., in Baltimore, which had been consigned to them for sale, by E. Webb, Maxcy & Co., of Louisville, the defendants; and that afterwards, and before the garnishees pleaded, there accrued from the sale of said property, over and above all advances, the amount of \$12,805. The amount of assignments specifically made of this fund by the orders of date the 30th day of December 1853, and recognized in the deed of trust of the following day, is \$28,714.42.

The correctness of the claim of the plaintiffs below is not

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questioned. The questions we are called upon to determine, grow out of the orders of assignment, the deed of trust, the proof of the laws of Kentucky, and the levying of the attachment.

If the assignments given on the 30th of December, be valid, and bind to their amount any balance of the proceeds of the sales of the consignments to the garnishees, then it is clear the plaintiffs could not recover in this action; those assignments being largely beyond, in amount, any fund in the hands of the garnishees to meet them.

On the part of the appellants, it was insisted, that the property attached, being in specie, in the hands of the garnishees, in Maryland, at the time the attachment was laid, and the garnishees having so continued in possession, their possession was the possession of the defendants, and could only be changed either by actual transfer to an assignee, or by deed executed and recorded according to the laws of Maryland, or actual notice to the garnishee. That if considered as a *chose in action*, the title of the assignee was merely *inchoate* until actual notice to the garnishees, and the property in the hands of the garnishees, over their advances, at the time of laying the attachment, was the property of E. Webb, Maxcy & Co., and the plea of *nulla bona* was not sustained by proof of the assignment, without actual notice to the garnishees, prior to the attachment.

It appears from the letter of the plaintiffs, of date the 4th of January 1854, that they had, at that time, knowledge an assignment had been made by the defendants; it does not, however, appear they were acquainted with its precise character. The letter of Carson & Edes, of the 6th of January 1854, is the only evidence of the time when they first acquired knowledge of the fact that Mr. Riddle had been appointed assignee, and this letter shows that the attachment of the plaintiff had been previously levied, of which it notifies Mr. Riddle. Although it is stated, in the admitted statement of facts in the record, that Joseph Carson, one of the garnishees, was in Madison, Indiana, at the end of the month of December, it nowhere appears he either had knowledge of the orders or of

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the deed, or assented to either. We cannot infer such knowledge or assent on his part.

The several orders given by the defendants, are, in language, substantially the same. The one in favor of Messrs. Parmelee & Bro., is as follows:

“LOUISVILLE, December 30th, 1853.

*Messrs. T. J. Carson & Co.*

Gentlemen:—When in funds from sales of our various shipments, to your houses in New York and Baltimore, of hog product, please pay to Messrs. Parmelee & Bro. the sum of ten thousand dollars, should the balance that may be coming to us amount to that sum, and oblige,” &c.

The case of *Tiernan, et al., vs. Jackson*, 5 Pet., 580, was this: A shipment of tobacco was made at New Orleans, by the agent of the owner, consigned to a house in Baltimore, the shipment being for the account and risk of the owner, he being at the time indebted to the consignees for a balance of account. The owner of the shipment drew two bills on the consignees, and on the same day made an assignment on the back of a duplicate invoice of the tobacco, in the following words: “I assign to James Jackson (the drawee of the bills) so much of the proceeds of the tobacco alluded to in the within invoice, as will amount to two thousand four hundred dollars, (the amount of the two bills,) to J. and L. six hundred dollars, &c., and Messrs. Tiernan & Sons (the consignees) will hold the net proceeds of the within invoice subject to the order of the persons above named, as directed above.” The court, after a most elaborate argument at the bar, by able counsel, held, that this assignment, by its terms, did not pass the legal title so as to authorize the assignees to sue in their own names, and fully endorsed the doctrine laid down in *Mandeville vs. Welch*, 5 Wheat., 277, 286, where it was said, that in cases where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund; and, after notice to the drawee, it binds that fund in his hands. But where the order is drawn either on a general or particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consents to the appropriation

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by an acceptance of the draft, or an obligation to accept may be fairly implied from the custom of trade, or the course of business, and that until the parties receiving a consignment or a remittance, under such circumstances, had done something recognizing the appropriation of it to the particular purposes specified, and the persons claiming had signified their acceptance of it, so as to create a privity between them, the property and its proceeds remained at the risk and on the account of the remitter or owner. The same doctrine was held by the Court of Appeals of this State, in the case of *Eichelberger & Erskine vs. Murdock*, 10 Md. Rep., 396.

There is not a particle of proof, in the record, that the garnissees ever agreed to the appropriations made by the orders of assignment of the defendants.

We think, so far as proof of the law of Kentucky is concerned, the court below correctly stated the law. The case of *Gardner vs. Lewis*, 7 Gill, 377, and of *Trasher vs. Everhart*, 3 G. & J., 242, are sufficient to show, in a case like the present, that the evidence of a foreign law is for the court. The two witnesses examined in regard to the matter, are, in our judgment, sufficiently explicit; they, in substance, say, (they being lawyers,) they are of opinion that the clauses and provisions in the deed of trust, according to the laws of Kentucky, are legal, and sufficient to convey to the grantee the property set forth therein, and that they know of no statute of Kentucky affecting that opinion, or bearing on the point. Opinion is belief, and nothing more; it is not absolute certainty, nor does the law require it to be so. If the reputation and professional standing of the two witnesses who were examined on this subject, were such as not to entitle them to credit, then, in that case, the fact should have been shown. They are wholly unimpeached, and, therefore, entitled to credit.

Although we deem the proof of the law of Kentucky sufficient, it does not therefore follow, necessarily, that we are to give it full effect in Maryland. The recognition of the laws of another State, in the administration of justice in this, is not a right *stricti juris*; it depends entirely on comity, and, in ex-

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tending it, courts are always careful to see that the statutes of their own State are not infringed, to the injury of their own citizens. The citations from *Justice Story's work on the Conflict of the Laws*, made in the opinion we have referred to, in *7 Gill*, are sufficient to establish the proposition we have stated. The question, then, is, is the deed of trust of the 31st of December 1853, so violative, if at all, of the statutes or policy of this State, as to make it null and void in this case? This inquiry is wholly aside of the doctrine recognized in some of the States, to wit, that a citizen of a State to whose forum application is had for the enforcement of the provisions of the deed, will not be compelled to resort to that of a State in which the deed was executed, but will be allowed the advantage of whatever lien his diligence may have given him on the property of his debtor, within the State of his own residence. This principle has been acted upon in Massachusetts, Vermont and Maine.

We know of no reason why the deed of the 31st of December 1853, should not operate in this case; the only one which has been suggested, is that arising out of the act of 1729, ch. 8, sec. 5. It is supposed that, inasmuch as the deed was not recorded within twenty days from its date, it can have no influence prejudicial to claim of appellants. In this view we do not concur. That section provides, that "no goods or chattels, whereof the vendor, mortgagor or donor shall remain in possession, shall pass, alter or change, or any property thereof be transferred to any purchaser, mortgagee or donee, unless the same be in writing, and acknowledged before one provincial justice, or one justice of the county where such seller, mortgagor or donor shall reside, and be, within twenty days, recorded in the records of the same county."

The preamble to this section of the act, shows that its purpose was designed to guard against conveyances of goods "*secretly*" made for the benefit of children, or pretended creditors, whilst the donor or mortgagor was left in the enjoyment of the same. It is clear, to our minds, it was not intended to apply to the case of a deed or bill of sale made in another State than Maryland. It can only, by its terms, em-

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brace such instruments as are made within the limits of Maryland, because the recording which it requires is to be made in the county where the seller, donor or mortgagor "resides."

It is the universal law, that the *situs* of personal property is the domicil of the owner. In this case it was in Kentucky, and not in Maryland, and, therefore, to be determined by the law of the former, and not by that of the latter. To make the act of 1729 applicable to a case like the present, would, in fact, be to declare it incompetent to a person residing in England, or in any other distant country, to dispose of property in Maryland, for, in such situation of parties, it would be next to, if not quite, impossible, to record within the twenty days, and absolutely so within *the county*, for the foreign owner would not "reside" in any county within the State.

We have alluded to certain principles of law to guard against misapprehension hereafter, when a case shall arise to which they may be applicable, and to provide against the inference that this court is, in all instances, to recognize in the broadest sense the laws of other States, when property adduced before it. But the case now under consideration, we regard as having been conclusively settled by the decision in the case of *Houston vs. Nowland*, 7 G. & J., 480. In that case the debtor resided in the State of Delaware, having property in Maryland. He executed a deed in conformity to the laws of Delaware, for the benefit of his creditors. It was not executed, acknowledged and recorded, so as to convey real estate in Maryland. After the execution of this deed, a creditor of the grantor, residing in Maryland, sued out an attachment, and had it laid on certain lands and certain credits. The judgment below was rendered for the garnishees, and this court affirmed that judgment, on the ground that although the deed did not *per se* convey real estate in Maryland, because not executed, acknowledged and recorded, in conformity to its requirements, yet it did transfer the title to the credits, and, therefore, the attachment could not be sustained. The only question which the court made in regard to the efficacy of the deed, was, that it was not executed, &c., so as to pass real estate; in regard to the other property, there was no difficulty,

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the instrument was deemed all sufficient. This case we hold to be decisive of the one now before us. In the argument, the court had presented to its consideration the case of *Ingraham vs. Geyer*, 13 Mass., 146, wherein it was held, that a deed executed in Pennsylvania, conveying property for the benefit of creditors, was void in Massachusetts as against an attaching creditor. In the Massachusetts case, the doctrine of comity was disallowed, in aid of the deed as against the attaching creditor. We are, therefore, bound to consider that case as not endorsed as applicable to one like the present. In addition to the authority of the case of *Houston vs. Nowland*, we refer to that of *Black, et al., vs. Zacharie & Co.*, 3 How., 483, which held, a transfer made in South Carolina, of stock in a corporation in Louisiana, to operate to defeat an attachment sued out in the latter State by the creditor of the person making the transfer, the attaching creditor having knowledge of the transfer at the time of suing out his attachment. It is manifest the plaintiffs had knowledge that an assignment had been made when they sued out their writ of attachment. Their letter, dated the 4th of January 1854, shows this.

Entertaining these views, we affirm the judgment below, regarding the law, as expounded by the Superior Court, as all that the plaintiffs were entitled to. The prayers which were rejected, were, for the reasons which we have assigned in treating of the principles governing the circumstances of this case, properly refused.

*Judgment affirmed.*

(Decided June 2nd, 1858.)

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### JACOB MARKELL vs. GRAYSON EICHELBERGER, Trustee of GEO. J. FISCHER and others.

A mortgage was executed "to indemnify, secure and save harmless" M., as surety on a specified note given by the mortgagor to S., "from all losses by reason of his liability as security aforesaid." This note, after maturity, was

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placed in bank for collection, and the maker being unable to pay the whole, the bank agreed to, and did, discount a new note of the maker for the balance, with M. and another, as endorsers. At the time M. put his name to this new note, it was understood by him and the maker, that the money raised on it should be applied to pay the balance on the old note due S., which was done, and the old note paid. HELD:

- 1st. That the liability of M., on the new note, was a continuation of the same liability as that secured by the mortgage, and this mortgage is a subsisting security therefor, and is entitled to a preference over subsequent mortgages of the same property.
- 2nd. The mortgagor being insolvent, and the mortgaged property having been sold, under a decree in equity, and the proceeds brought into court, M. has the right to have them applied to this debt, though he has not paid the note to the bank.

**APPEAL** from the Equity Side of the Circuit Court for Frederick county.

This appeal is taken from an order of the court below, (NELSON, J.,) overruling exceptions filed by the appellant to, and finally ratifying and confirming, the auditor's report, distributing the proceeds of certain mortgaged property sold under a decree of said court, by Eichelberger, as trustee. The facts of the case are fully stated in the opinion of this court.

The cause was argued before ECCLESTON, TUCK and BARTOL, J.

*Samuel Tyler* for the appellant:

1st. As the claim due the Smiths was closed by funds obtained, upon the security of *Markell*, from the bank, and the liability of *Markell* as security for the claim due, at first, to the Smiths, and then transferred to the bank, was not, by such transfer, exonerated, but only transferred, the mortgage to *Markell* remained as a security to indemnify him against any liability for his security in the note to the bank.

This point is fully established by the case of *Chase vs. McDonald & Ridgely*, 7 H. & J., 160. The deed, in that case, was given by Samuel Chase, the father, in 1809, to indemnify Ridgely, who was about to become the endorser of certain notes to the amount of \$10,000, to be drawn by S. Chase,

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the son, in favor of T. Chase, another son of the grantor, and to be first endorsed by T. Chase, and then by Ridgely, and to be discounted at the *Union Bank of Maryland*. The recital of the deed is explicit, that the sons "are about to obtain a loan of \$10,000 from the Union Bank of Maryland," and that "Samuel Chase, the elder, hath agreed to secure the payment of said notes, and to indemnify the said Nicholas G. Ridgely by reason of any endorsement made by him of the notes of the said Samuel Chase, the younger, not exceeding the sum of \$10,000," then the conveyance to be void. Ridgely did become endorser of notes to the amount of \$10,000, discounted at the Union Bank. But, some years afterwards, the Union Bank being unwilling to permit the notes to be renewed any longer, notes with Ridgely as endorser, were discounted at the City Bank of Baltimore, and the proceeds applied to close the debt due at the Union Bank. The court held, that as the debt due at the Union Bank was closed by funds obtained from the *City Bank*, the mortgage from Chase to Ridgely remained as a *security* to indemnify Ridgely against any *liability* for his *endorsement of the last mentioned notes*. This reason extends to the case now before this court. The claim to the Smiths was closed by funds obtained from the Farmers & Mechanics Bank, on Markell's security, because of Markell's liability for Fischer to the Smiths. The mortgage was given to indemnify against any loss by reason of that liability. The loss by the debt at the bank would certainly be by reason of that liability. It must be noted that Markell is indemnified against all and every loss, by reason not merely of his *security*, but by reason of his *liability* as *security*; extending the indemnity beyond the transaction in which Markell is primarily *security* to any transaction which may be the natural consequence of his *security*, in the ordinary course of business. The contingency on which loss might happen, that was in the minds of the mortgagor and mortgagee, was larger than the word *security* seemed to them to express. The word *security* might be confined to the original transaction, but the word *liability* rescues the intention from that narrow construction. Courts of equity must accommodate their rules of construction to the ordinary

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course of business. They must consider what are the ordinary consequences likely to ensue, when they undertake to determine the liability of a security which the debtor intended to secure him against. Equity doctrine is not an arbitrary rule established *a priori* by the courts, to which human transactions must conform, but it is a rule which the transactions themselves dictate to the court, as the substantial justice between the parties. The relation of Markell to Fischer, and not of Fischer to the Smiths, is the proper point of view of this case. From this point of view, it is seen that the ordinary doctrine, that payment discharges the mortgage, does not apply to this case. The mortgage is not merely to secure the payment of the money to the Smiths, but to indemnify Markell against his liability. Unless, therefore, the money due the Smiths be paid in a way that relieved Markell from all liability incurred by his security for Fischer, the indemnity against that liability must continue. There is a radical difference between a stipulation to perform some specific act, as the payment of a sum of money intended to be by way of indemnity, and a general covenant to indemnify and save harmless. Fischer, in an action on his covenant, could not plead *that he had paid the sum of money due the Smiths*. The proper plea would be, *that Markell was not in any manner damaged by reason of his liability as security*. The mortgage is a pledge of the property to the full extent of the covenant contained in the recital and proviso of the deed. A court of equity, in dealing with securities, is not confined by the narrow, legal doctrine of contract, but acts upon the more enlarged doctrine of natural justice. The whole power of substitution, so freely exercised by courts of equity, in favor of securities, has no foundation in contract, but rests solely upon the basis of natural justice. Surely, then, the equity between Markell and the subsequent mortgagees, will authorize this court to hold the mortgage responsible for the claim transferred to the bank, the liability in the original transaction being the reason of Markell's security in this. Will it be maintained that the liability of a security is so entirely confined to the original transaction that by no change or substitution whatever, can the guaranty against

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loss belonging to the security be extended to the substituted transaction? Such a decision would certainly be a revolt against the case of *Chase vs. Ridgely*, and a recoil against the progressive doctrine of ages. It would be adopting a rule of construction narrower than the common sense and the substantial justice of the matter.

2nd. The partial payment by Fischer, and the procuring another security with Markell, did not *extinguish* Markell's liability, but only *lessened* it. A partial payment of the debt does not release a mortgage, (4 *Kent*, 162,) neither does the obtaining another security.

3rd. The act of Assembly of 1825, ch. 50, has no bearing on this case. That act intended to provide against tacking. 1 *Gill*, 424, *Cole vs. Albers & Runge*. 3 *Md. Ch. Dec.*, 473, *Young's Estate*. A law that is grounded on a reason, obliges no further than the reason of it extends.

*In reply* to the 1st point of the appellees, it is insisted that the indemnity of Markell against *liability* is more comprehensive than that of Ridgely, in 7 *H. & J.*, against *endorsements*. The note to the Smiths is referred to in the mortgage to Markell merely as *descriptive*; to the 2nd point, that the *liability* of Markell was transferred to the bank; the case of *Brinckerhoff vs. Lansing*, favors the appellant, and not the appellee, if it has any bearing on the question in this case; to the 3rd point, that Markell has such an interest in the fund as entitles him to an appeal. The fact that Markell *has not paid*, will not authorize the court to deprive him of his indemnity. The fund might be the only means by which he could pay. If this court decides that the mortgage indemnifies Markell against his liability to the bank, such proceedings can be had in the court below as to apply the fund to Markell's indemnity. And to the 4th point, that the question between the classes of creditors is dependent on the question between Markell and Fischer.

*Grayson Eichelberger* for the appellees:

1st. The mortgage upon which the question in this case arises, was given on the 26th of November 1850, to indemnify

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Markell against his liability as security for Fischer, on the note to the Smiths for \$535. This note was not paid by Markell, the surety, but by Fischer, the principal, to whom, on its payment, it was delivered. Upon what principle, then, can the note of *the bank*, against Fischer, Markell and Bevan, be substituted for the Smith note, recited in the mortgage? It was not a *renewal* of the Smith note, for the facts show that the Smith note was not discounted by the bank, and, on maturity, renewed by the note in question, but was left with the bank for collection, and that Fischer, the principal, not being able to meet it at maturity, wholly, with his then means, contracted a *new debt*, with *new security*, and with a *new creditor*, for the purpose of paying his debt to the Smiths. This case is not within the principle of *Chase vs. McDonald & Ridgely*, 7 H. & J., 161. That was the case of a mortgage to indemnify Ridgely, the security, against "*any endorsement*" of the notes of Chase, to an amount not exceeding \$10,000, and it was properly held, that, under such a mortgage, Ridgely was protected thereby, so long as his liability for Chase, upon any note springing out of, or connected with, the original transaction, continued. That, moreover, was a mortgage given to secure him against a general endorsement to a specified amount, to be entered into thereafter, on notes *which were to be renewed from time to time*; the mortgage in this case was to indemnify Markell against any *existing* liability on a specified note.

2nd. The Smith note was not *transferred* to the bank, as contended for by the appellant's counsel, but, in the case of the note in question, which is sought to be introduced into the mortgage, there is a *new creditor, a new debt, and a new security*, thus bringing the case within the principle decided, by necessary inference, by Chancellor Kent, in *Brinckerhoff vs. Lansing*, 4 Johns. Ch. Rep., 75, 76.

3rd. Conceding, for the sake of the argument, that the view presented by the appellant is correct, still he has not put himself in a position to claim the benefit of it. He has never paid the note in bank, nor any part of it, and, until he had done so, could not have filed a bill for sale or foreclosure, nor has he, until then, such an interest as authorizes him to appeal.

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The note in question is still held and owned by the bank, and they have taken no appeal.

4th. This is not a question between Markell and Fischer, but between two different classes of the creditors of Fischer.

BARTOL, J., delivered the opinion of this court.

The facts in this case are very fully set out in the agreement of the solicitors, appearing in the record, and may be briefly stated as follows:

George J. Fischer was indebted to Corilla H. Smith and Philemon M. Smith in the sum of \$535, on his promissory note, dated the 12th day of March 1850, and Jacob Markell was liable as his surety on said note. Fischer, in order "to indemnify, secure and save harmless said Markell from all loss by reason of his liability as security aforesaid," on the 26th of November 1850, executed to said Markell a mortgage, with the condition that the said Fischer should pay the aforesaid sum of money, with legal interest thereon, and should "well and truly indemnify and save harmless the said Markell from all and every loss by reason of his liability as security as hereinbefore recited," which mortgage was duly executed and recorded; after which the said Fischer executed another mortgage, conveying the same property to other persons, for the purpose of securing other creditors and sureties.

The note due Corilla H. and Philemon M. Smith was placed by the payees, after its maturity, in the Farmers & Mechanics Bank of Frederick county, for collection, with instructions to institute suit thereon, if not paid by a certain day. The cashier then told Fischer, if he would pay a part of the sum due on said note, the bank would discount a note for him, to enable him to pay the balance. Whereupon the said Markell, together with one Joseph Bevan, united with said Fischer in giving a note, dated November 8th, 1854, for \$475, payable, in six months, to Thomas Morgan, cashier, or order, and the money raised by said note, together with the sum paid by Fischer, was applied to the payment of the note due C. H. and P. M. Smith. At the time Markell put his name on said note for \$475, it was understood by him and Fischer, that the

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money to be raised upon it, was to be applied to the payment of the balance due on the note to the Smiths. The name of Bevan, thereon, was procured by Fischer, because the bank required another security or drawer; and the same remains unpaid, and is held by the bank. It is also admitted that Fischer is insolvent, and was generally known to be very heavily indebted at the time the said note was discounted.

The mortgaged property was sold under a decree of the Circuit Court for Frederick County, sitting in equity, passed upon a bill filed by prior incumbrancers, and the fund arising from the sale was brought into court. The cause being referred to the auditor, he stated an account, applying the proceeds of sale to the payment of the claims of prior mortgagees, and to parties claiming under the subsequent mortgage, to the exclusion of the said note for \$475, held by the bank, on which said Markell is surety. And the said Markell filed exceptions to the auditor's report, claiming that he is entitled, under the mortgage of the 26th of November 1850, to have the said note for \$475 paid out of the fund. The Circuit Court, by its order of the 25th of September 1857, overruled the exceptions, and ratified the auditor's account, and from that order this appeal is prosecuted.

It is admitted that the fund is insufficient to pay all the mortgage claims, and that the claims Nos. 11 and 12, allowed in the audit, are claims secured by the last mortgage, which was executed after that of the 26th of November 1850, had been executed and recorded.

We think this case is within the principle recognized and decided by the Court of Appeals, in the case of *Chase & McDonald, vs. Ridgely*, 7 H. & J., 160. There the mortgage was given to indemnify Ridgely as surety on account of his prospective liability as endorser on certain notes to be given to the *Union Bank*; the notes were given, but were afterwards paid with funds obtained from the *City Bank*, upon notes endorsed by the mortgagee as surety. The court held, that the liability of the surety on the notes given to the City Bank, was covered by the mortgage; it was treated as a continuation of the same liability on the part of the surety, although the

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notes originally given to the Union Bank, after being renewed from time to time, as specified in the mortgage, had been paid and surrendered. The court considered that the debt for which the surety was liable, remained unpaid. It was only transferred from one bank to another, and the indemnity secured to the endorser under the mortgage, remained.

That is a stronger case, in support of the appellant's views, than the one before us. Here the original note was held by the Farmers & Mechanics Bank of Frederick county, for collection. The bank consented to accept payment of a part, and to take a new note from Fischer for the balance. On the new note thus given for a part of the original debt, Markell, the mortgagee, remained liable as endorser and surety. We see no good reason why the mortgage should not stand as security to indemnify him from that liability.

If the note for \$475 had been given to the Smiths as a renewal in part of the first, there could be no doubt that Markell's liability upon it would be covered by the mortgage, although no provision is made in the mortgage for renewals; the case of *Brinckerhoff vs. Lansing*, 4 Johns. Ch. Rep., 65, cited by the appellee's counsel, establishes that position. Then what difference is there in principle growing out of the fact that the bank, which held the note as agent of the payees, made the arrangement whereby \$475 of the debt remained unpaid, and Markell's liability to that extent was continued? We are of opinion that the mortgage to the appellant, of the 26th of November 1850, is a subsisting security to indemnify him for his liability on the note for \$475, and the fund should be applied to the payment thereof, after satisfying prior liens.

The question next arises, is he in a position to claim the benefit of it, not having paid the note to the bank? In this case the principal debtor is insolvent, and the funds pledged by the mortgage to indemnify the surety are in court; it would, in our opinion, be inequitable to deny to the surety the right to have them applied to the payment of the debt. To use the language employed by the Chancellor, in *Chase & McDonald, vs. Ridgely*, "If the mortgage had been given to the bank, and not to *Markell*, equity would give him the benefit of it,

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and surely if a court of equity would give him the benefit of the mortgage given to the bank, it will not deprive him of one given to himself." 5 G. & J., 314.

In order that the auditor's account may be corrected, and further proceedings had, in conformity with the opinion of this court, the cause will be remanded.

*Order reversed and cause remanded.*

(Decided June 2nd, 1858.)

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### JOSEPH BROWN and others' Lessee, vs. REBECCA BROWN.

A testator, by *opt words*, devises a tract of land *in fee*, then "leaves" all his personal estate, except negroes, to be disposed of by his executor, and the residue of his real estate "to be rented out yearly," directs his house to be repaired by his executor "from the income of his real and personal estate," manumits his negroes, Beckey and Elizabeth Ellen, and directs others to be hired out for a term of years, and then set free, and then "leaves Beckey and her children a reasonable support, to be given by his executor from the income of his real and personal estate, during her life, and at her death" he gives "to Elizabeth Ellen all the income of his whole estate, real and personal, to her and her heirs forever, to be paid over yearly by his executor, but if there should be any among them not able to take care of themselves, they are to have a support." He then appoints his executor, and gives him a legacy of \$100 "and ten per cent. on all money received by him and his heirs forever." HELD:

That under this will, the *legal title* to the residue of the testator's real estate passed to the *executor*, who took therein a *trust by implication* for the benefit of the manumitted negroes, and such a devise does not contravene the *policy of the laws of this State*, in regard to free negroes.

### APPEAL from the Circuit Court for Saint Mary's county.

*Ejectment* brought on the 24th of July 1852, by the appellants, heirs at law of Clement Brown, deceased, against the appellee, for the recovery of certain real estate, of which said Brown died seized. Plea, *non cul.*

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**Exception.** The case was submitted to the court below upon a statement of facts, in which it was agreed that the land in controversy, called "*Maiden Bower*," containing about one hundred acres, belonged to Clement Brown, who died in 1836, leaving a duly executed will, dated the 12th of December 1835, (a copy of which is filed as part of the statement,) and the plaintiffs, his heirs at law; that this land is all the real estate owned by him, except the tract called lot No. 1, devised to John Francis Brown and Jane Rebecca Brown; that negro Beckey and her children, and Elizabeth Ellen, are free negroes, left free under his will, and afterwards declared free by a court of competent jurisdiction, and are all now living. The only question to be decided is, whether, under this will, the land in controversy passed to any devisee mentioned therein, or whether it was undisposed of thereby, and passed to the heirs at law? All errors of pleading are waived, and it is agreed that a *pro forma* judgment may be entered, either party having the right to appeal.

The will, which was admitted to probate on the 27th of September 1836, contains the following provisions:

"I give, devise and bequeath unto John Francis Brown and Jane Rebecca Brown, the tract of land on which their mother now lives, called lot No. 1, a part of the Church Swamp, to them and their heirs forever."

"*Item.*—I give and bequeath unto John Williams one pine canoe and two pair of oyster rakes, to him and his heirs forever."

"*Item.*—I leave all my personal estate to be disposed of by my executor, hereinafter mentioned, except negroes."

"*Item.*—I leave the plantation on which I now live to be rented out yearly."

"*Item.*—I leave one negro girl, Ellen, to be hired out for ten years, one negro boy, Thomas, to be hired out for ten years, and one other negro girl, Nancy, to be hired out for fourteen years, by my executor, hereinafter mentioned, and then set free, under the protection and care of my executor."

"*Item.*—I leave my negro woman Beckey, Elizabeth Ellen and James Henry, free, them and their heirs forever,

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under the protection and care of my executor, hereinafter mentioned."

"*Item.*—I placed \$700 in the hands of Thompson D. Hayden, to purchase a negro man for me. Should it be so, he is to be hired out for seven years, and then set free, by my executor, hereinafter mentioned, under his protection and care. I leave my house to be repaired by my executor, from the income of my real and personal estate."

"*Item.*—I leave my negro woman Beckey and her children a reasonable support, to be given by my executor, hereinafter mentioned, from the income of my real and personal estate, as long as she shall live; at her death, I give to Elizabeth Ellen all the income of my whole estate, real and personal, to her and her heirs forever, to be paid over yearly by my executor, hereinafter mentioned, except there should be any one among them not able to support themselves, then they must have a support. I also leave Elizabeth Ellen one bed and bedstead, one pair of sheets, two pillows and bolsters, two counterpanes, to her and her heirs forever, to be paid over by my executor, hereinafter mentioned."

"*Item.*—I give to Charles Hayden, of Bartholomew, the sum of \$100, and ten per cent. on all money received by him and his heirs forever. And lastly, I do hereby constitute and appoint Charles Hayden, of Bartholomew, sole executor of this my last will and testament."

Upon this statement of facts, the court (CRAIN, J.,) gave judgment for the defendant, and the plaintiffs appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

*John M. S. Causin* and *Alex. Randall* for the appellants, insisted, that by no sufficient terms in this will, has the real estate in controversy been devised, and that it necessarily descends to the heirs at law.

1st. It is a general rule, that the heir at law is not to be disinherited, except by express words, or necessary implication.

*1 H. & J., 417, Berry's Lessee vs. Berry. 7 G. & J., 248,*

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*Creswell vs. Lawson.* An *intention* to disinherit, not carried out in a legal mode, will not work such purpose. 3 H. & McH., 333, *Lingan vs. Carroll.*

2nd. The executor, under this will, took no legal interest in fee in the estate, but a mere power to collect and apply the income. He has no power of *sale*, nor is there any devise to him *in trust* to sell, nor any *trust* whatever created in him; he has simply the naked power to collect and apply the income. A devise of the *profits* of the land does not *ex vi termini* pass the land, but only affords *evidence* that it was the *intention* of the testator that it should pass. But, in this case, by construing the devise of the *income* as passing the estate, the effect would be to vest the estate absolutely in the manumitted negroes, which would *frustrate* the very object which the testator had in view, viz: the support and maintenance of these negroes and their children, *under the care* of the executor. See 4 G. & J., 323, *Magruder vs. Peter.* 6 G. & J., 423, *Guyer vs. Maynard.* 1 G. & J., 503, *Warfield vs. Gambrill.* 2 H. & J., 369, *Keys vs. Goldsborough.* 12 G. & J., 84, *Hatton vs. Weems.* 9 Gill, 438, *Chelton vs. Henderson.* 8 G. & J., 436, *Hammond vs. Hammond.* 3 Md. Ch. Dec., 42, *Boyle vs. Parker.* 4 Md. Rep., 1, *Cassilly & Wife, vs. Meyer, et al.* 2 Jarman on *Wills*, 533, 534, 536 to 539. 1 Wms. on *Excrs.*, 549, 550, note. 6 Johns., 73, *Jackson vs. Jansen.* 1 Peere Wms., 418, *Trafford vs. Ashton*, and note. 1 Atk., 506, *Green vs. Belchier.*

3rd. That the evident purpose of the testator was to provide for the manumitted negroes a *permanent residence* in Maryland, and this purpose is inconsistent with the policy of our laws on this subject, and the devises contemplating such an end, are, therefore, *void* in law. The court cannot modify the will any more than it can a deed, when attacked for fraud, (2 H. & G., 34, *Lowry vs. Tiernan,*) and if the *intent* is to violate the law, the will is *void*. By the act of 1831, ch. 281, it was the declared policy of the Legislature, that negroes thereafter manumitted, should not become residents of the State, and should not remain in it in a condition of freedom. This *policy* of the law the courts must carry out, and where a

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will attempts to evade it, they must decide that such a will is void. 1 Md. Ch. Dec., 355, *Monica vs. Mitchell*. 5 Md. Rep., 134, *Wilson vs. Farquharson*. Again, is is obvious, from the words of the devise in favor of Elizabeth Ellen and her heirs forever, that his intention was to create a perpetual and inalienable charge upon the land, which will not be sustained in law. 4 Kent, 274.

No counsel appeared for the appellee.

TUCK, J., delivered the opinion of this court.

This is an appeal from a judgment of the Circuit Court for St. Mary's county, rendered upon a case stated, wherein the appellants sued the appellee, to recover certain land mentioned in the will of Clement Brown. The plaintiffs claimed as heirs at law of the deceased, and the defence was that this land had been effectively devised by the will, and "the only question was, whether, under said will, the land in controversy passed to any devisee mentioned in said will, or whether the said land was undisposed of by said will, and passed to the heirs at law of said Clement Brown?"

That the testator intended that certain of his negroes, whom he manumitted by the will, should enjoy this land, cannot be questioned; and we think it is equally plain that he did not intend they should have it by a devise of the legal title; because, apart from the language employed in reference to this portion of his estate, by a previous clause he had devised another lot to others, in terms indicating that he knew how to create an estate in fee-simple. A like circumstance was relied on by the court in the cases of *Dougherty vs. Monett*, 5 G. & J., 459, and *Mitchell vs. Mitchell*, 2 Gill, 230, in ascertaining the testator's intent in regard to particular clauses of wills.

It is well settled that trusts may arise by implication, and that where a trust is created by will, or duties imposed on executors, and no express devise to them for the purposes of the trust, the legal estate may vest in them by intendment of law, to enable them to discharge such duties; because, otherwise, the testator's intent might fail altogether. *Lewin on*

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*Trustees*, 234, (24 Law Lib.) 1 Powel on Dev., 220, (21 Law Lib.) 2 Story's Eq., secs. 1058, &c. *Hill on Trustees*, and notes, Part 2, ch. 1, 2. And there are cases in which an estate has been supplied, where none in terms passed, to enable the executor to perform duties imposed by the will. Of this kind was *Bush vs. Allen*, 5 Mod., 63, where a testator devised to a *feme covert* the issues and profits of land, to be paid by his executors, and the question was, whether it was a devise to her, for life, of the land, or that the executors should receive the profits to her use? Ch. J. Holt was of opinion that the legal import of the words—that is, giving her the rents and profits—was equivalent to a devise of the land for life; but the other judges decided that the executors took an estate by implication, for the use of the *feme covert*, although there was no devise to them. The same will came before the court in *South vs. Allen*, 5 Mod., 98 and 102, where the point appears to have been fully argued at the bar, and the same construction was adopted. And, although the chief justice dissented, as in the other case, he said that the intent of the testator would be better fulfilled if the words should be construed to give an interest to the executor, but he thought such a construction would have the effect of making a devise by implication contravene the express words of the will. There was no pretence that the heirs at law had any title; the contest was between the legatee of the rents and profits, who claimed the land, and the executor claiming title, by implication, as trustee for her benefit, in an ejectment which might have been defeated on the ground of the outstanding title of the heirs, if they had had any, but no such point was made. We find these cases referred to, in support of the doctrine that the title may pass by implication, in 1 Powel on Dev., 220; *Lewin on Trustees*, 235; *Hill on Trustees*, 232, 234, 407; *Fletcher on Trustees*, 4, (10 Law Lib.) But in 1 Eq. Ca. Abr., 383, pl. 2, the case of *South vs. Allen*, as reported in 1 Salk., 228, is cited to show that the title was declared to be in the *feme covert*, and not in the executors. This report reverses the position assigned to the judges in 5 Mod., 63, 102, and is there said to be a mistake. We suppose the report in 5 Mod. to be correct, because the decision was

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made on the authority of *Griffith vs. Smith, Moore*, 753, which we find to have been in accordance with the opinion ascribed to the associate justices. This discrepancy is alluded to, not as affecting the present case, because, according to either report, the heirs at law would be excluded.

The same principle was applied in the case of *Oates vs. Cooke*, 3 *Burr.*, 1684, which was between one of the heirs at law and the executor named in the will. The will did not contain a devise to the executor, but there were sums given to different persons, annually, with the direction that "these legacies be faithfully paid by my trustee, John Cooke, every year and yearly, one month after Martinmas." The testator left to his trustee and executor, out of the yearly rents of the farm, one pound ten shillings a year and yearly, for repairs and other uses of the farm. There were other clauses in the will, and Cooke was named sole executor and trustee, he paying all the debts, legacies, and funeral charges. The question was, whether any estate, and what, passed to Cooke? Lord Mansfield said, he had no doubt that the intention was clear that the testator meant to devise his real estate in trust, and the other judges concurred, Mr. Justice Wilmot observing, that the intention must be collected from all the parts of the will; that if it was necessary to imply a legal estate in the executor, it was the same as if expressed; and that there were trusts to be executed which the trustee could not effectuate, without having an estate in fee.

In *Anthony vs. Rees*, 2 *Cromp. & Jervis*, 75, a testator gave his freehold estate to his granddaughter, and to his wife the sum of twenty pounds, yearly, as long as she lived, to be paid out of the freehold estate, and a leasehold estate, by trustees thereafter named; it was held, that the trustees had the legal estate, that they might perform the duties imposed upon them. And the same doctrine was announced in *Beezeley vs. Woodhouse*, 4 *Term Rep.*, 89, where a testator directed moneys to be paid by his executor, out of his whole estate. The doubt was, whether the words included real property; but that being so decided, an estate was implied in the executors.

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The reported cases show many instances of trusts by implication, where none was declared, and of titles by implication in trustees, where there was no express devise of the estate. It is immaterial whether there is, or not, a direct devise to trustees, if the intention that they shall take the estate, can be collected from the whole will. 2 *Jarman on Wills*, 202, (*Perkins' Ed.*, 148,) who cites the case of *Doe vs. Homfray*, 6 *Adol. & Ellis*, 206, (33 *Eng. C. L. Rep.*, 55,) in which Ld. Ch. J. Denman, and the other judges, decided, that a devise to the intent that certain persons should receive rents and profits, and pay them to another, vested the estate in them as trustees. See, also, *Brewster vs. Striker*, 2 *Comstock*, 19. *Doe vs. Gillard*, 5 *Barn. & Ald.*, 785. The question, in such cases, generally has been, not whether the heirs at law were entitled, but, whether the estate passed to the trustees, or was executed under the statute in the person designed to be benefitted by the testator.

Upon considering this will in all its parts, we are of opinion that the testator intended that his executor should hold this land, as well as the personal property not otherwise disposed of, for the benefit of the negroes mentioned in that connection, of whom this appellee was one. The will manumits his negroes; some immediately, and others at different periods after his death; they, in the meantime, to be hired out by the executor. It directs his farm to be rented out yearly, and provides how the income from his real and personal estate shall be applied. The house is to be repaired, by the executor, from this income; and to Beckey and her children he leaves a reasonable support, to be given, by the executor, from this income, as long as she may live; at her death, all the income of the real and personal estate to be paid yearly to Elizabeth Ellen, subject to the support of the infirm; and to the executor he gives ten per cent. on all money received by him and his heirs forever. It is manifest that the testator expected these hires and rents to come into the executor's hands, and, after deducting this ten per cent., to be applied by him to the purposes of the will. He cannot pay as directed, unless he receives, and he must have an estate that will enable him to

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Brown *et al's* Lessee, vs. Brown.

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rent the land, hire the negroes, and compel payment by those with whom he may contract. This is the inevitable inference, from the whole will, and is fully supported by the cases to which we have referred. They are so much alike in material respects, that they may be considered quite in point.

The argument, on the part of the appellants, on the authority of *Negro Monica vs. Mitchell*, 1 Md. Ch. Dec., 357, does not apply here, even conceding the correctness of that decision, as to the act of 1831, ch. 281; for this will, instead of providing that the negroes shall live on the land, directs it to be rented out, and does not contravene the policy of our laws in regard to that population, as the chancellor interpreted the will then before him. But we are not prepared to say—nor did the chancellor—that a master cannot leave land to negroes whom he may manumit by his will. Indeed, we think such a devise may promote the policy of the State, by enabling negroes to provide the means of removing to Liberia, or elsewhere, beyond the State, when required to do so, as they may be, by the officers of the law, on the contingencies mentioned in the act of Assembly; at the same time, that such devises may have the effect of dispensing with the requirement of the law, in the event of their becoming unable to support themselves. *Tongue vs. Negro Crissy*, 7 Md. Rep., 453. It is certain that their being devisees of real estate, will not give them any rights not enjoyed by others, but as long as they are allowed to remain in the State, why may they not have land of their own? If set free without any such devise in their favor, they might hold land acquired in any other way, and if they remove, the title to the land would remain in them.

But, since the case of *Monica vs. Mitchell*, the chancellor and this court have recognized a trust of this description by giving effect to a will in which land was devised to trustees for the purpose of being rented out, and the proceeds applied for the use of negroes manumitted by the will. If, as we think, this will created a trust by implication for like purposes, its provisions no more infringed the policy of the law than did that of the testator in the cases of *Robinson vs. Robinson*, 4

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*Md. Ch. Dec.*, 176, and *Wilson vs. Farquharson*, 5 *Md. Rep.*, 134.

Upon a careful examination of the will before us, and of many adjudged cases bearing upon the points urged in argument on the part of the appellants, we are of opinion that the case was properly decided below, and affirm the judgment.

*Judgment affirmed.*

(Decided June 14th, 1858.)

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### JOHN J. HECKART *vs.* DANIEL H. MCPHAIL, Lottery Commissioner.

By the act of 1839, ch. 234, certain commissioners were authorized to raise, by lottery, for a specified purpose, "the sum of \$30,000, *free and clear* of all charges and interest whatsoever," and this grant was afterwards consolidated with the State lotteries, by the act of 1842, ch. 74, which directed the State Lottery Commissioners to draw the lottery, and pay over to the commissioners named in the grant, the money authorized to be raised.

**HELD:**

That the *special commissioners* named in the act of 1839, were the proper parties to ascertain the amount of *expenses* and interest incurred, and a *decree* of a court of competent jurisdiction, in a case in which such *commissioners* were defendants, and the *assignees* of the grant complainants, *ascertaining* the sum due on a basis making an *allowance for expenses*, entered upon the books of the *State Lottery Commissioners*, is binding upon them and their successors, unless obtained by collusion or fraud.

#### APPEAL from the Superior Court of Baltimore city.

This was an application, made by the appellant, for a rule upon the appellee to show cause why a *mandamus* should not issue, commanding him, as State Lottery Commissioner, to issue his draft on the Lottery Contractor for payment of a balance of \$546.29, on the semi-annual instalments, due the petitioner, under a certain decree of Baltimore County Court.

The petition states that, by the act of 1839, ch. 234, certain commissioners therein named were authorised to raise, by a

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lottery, "the sum of \$30,000, *free and clear of all charges and interest whatsoever*," for the purpose of building, by contract, an outlet lock on the Tide Water Canal, opposite Port Deposit; that subsequently, by the act of 1842, ch. 74, this lottery was consolidated with the State lotteries, and made subject to the legal provisions attached to them; that in January 1847, the commissioners named in the act of 1839, contracted with certain parties for the building of this lock, and agreed to assign to them, therefor, all the money arising from this lottery; that the lock was duly built, according to contract, and the contractors assigned their interest in the lottery to Wilmer, Heckart and Tome, one-fourth each to the first two, and one-half to the last named; that, subsequently, these assignees applied to the then State Lottery Commissioners for the proper amounts due them under the distribution adopted under the lottery system, but the commissioners refused to recognize them as assignees, until some legal proceedings were taken to make a proper transfer of this lottery grant to them, and a direction from a proper court to the commissioners, ordering payment of the sum ascertained to be due them; that thereupon Wilmer, Heckart and Tome filed their bill on the equity side of the Superior Court of Baltimore city, in December 1851, against the commissioners named in the act of 1839, and a decree (a copy of which is filed with the petition) was therein passed by the court, on the 30th of December 1851, directing the defendants to transfer to the complainants this lottery grant, and "that the said complainants be entitled to receive from the State Lottery Commissioners, and their successors, such sum, semi-annually, as amounts to the proportion of said lottery grant, out of the proceeds of the State lotteries, until the said complainants receive the sum of \$15,034.92, being the residue of the \$30,000, authorized by said act of 1839, ch. 234, to be raised, after deducting what has been paid to the said defendants, over and above their expenses," and that this sum be paid to the complainants in the proportion of one-half to Tome, and one-fourth each to Wilmer and Heckart. The petition further states, that after the passage of this decree, a copy thereof was filed with the State Lottery Commissioners, and recorded upon

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their official books, and assignments made under it, with their concurrence and approval; that the State Lottery Commissioners were succeeded by the State Lottery Commissioner elected under sec. 7, art. 4, of the present constitution of the State, and this officer, under the direction of the 5th section of the same article, in relation to making such contract or contracts as would extinguish all existing lottery grants before the 1st of April 1859, and under the direct authority contained in the act of 1852, ch. 113, made a contract with R. France, providing therein for the payment, on the draft of the Lottery Commissioner, to the persons or bodies politic or corporate, in equal semi-annual instalments, of the sum to be distributed amongst the existing lottery grants, during the term of such contract; that after making this contract, the State Lottery Commissioner made certain distributions under the lottery created by the act of 1839, but not in the proportions according to the aforesaid decree, nor of the constitution and law, and not in such equal semi-annual instalments as will pay the holders thereof the sum decreed by the court to be paid to them within the time prescribed by the constitution; that the sum allowed and ascertained to be due by the decree, was \$15,034.22, and that prior to the first distribution, under the new contract, there had been distributed the sum of \$1063.82, leaving due, October 1st, 1852, the sum of \$13,430.38, to extinguish which, prior to April 1st, 1859, would require semi-annual distributions of \$959.31 $\frac{1}{4}$ , commencing on the 1st of October 1852; that, instead of distributing this amount, the commissioner has made semi-annual distributions of \$716.45, which, in the aggregate, amounted, on the 1st of October 1856, to \$6448.65, instead of \$8633.82, leaving a balance due the holders, on that day, of \$2185.17, of which \$546.29 is due the petitioner; that this \$6448.65 was received under protest by the petitioner, and he charges that he has again and again demanded of the State Lottery Commissioners, severally elected under the constitution, his proper drafts upon the contractor aforesaid, and has demanded of them a draft for the balance due him on the distributions already made, and has demanded of the present Lottery Commissioner a draft for the

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sum of \$546.29, being the amount still due him on the proper semi-annual payments, but that each of these demands has been refused, and that he is remediless in the premises, except by a writ of *mandamus*.

The rule was laid, and the appellee showed cause. He admits the grant made by the act of 1839, and its union with the consolidated lotteries, by the act of 1842, so as to give it the benefit of the receipts, on account of those lotteries beginning with the fiscal year which commenced 1st of December 1843. That the amount then entered on the books of the commissioners, as to be raised, was \$30,000, and no more, being the sum mentioned in the act of 1839. That it does not appear, from the records of the State Commissioners of Lotteries, that they were ever notified by the commissioners named in the grant, or any one for them, while they remained in possession of it, or by any of the assignees, after their title accrued, that any charges or interest had been paid or incurred on account of the grant, so as to make it necessary to raise any sum for such charges and interest, over and above the \$30,000. That the commissioners of the grant never attempted to sell tickets or draw schemes, and incurred no expense or responsibility on account of the grant, before its consolidation, and that no claims for any charges or interest were ever notified to the State Commissioners, and no demand has ever been made on any of them to raise any sums on such account, over and above the \$30,000. That, on the contrary, the first payment made on the grant, in July 1844, was calculated on the basis of \$30,000, and that all the payments since, have been made on the same basis. That in 1852, the then Lottery Commissioner, (Stewart,) pursuant to the provisions of the new constitution, made a contract for the extinguishment of the then existing grants, and fixed and ascertained the amount to be raised on this grant at the sum of \$10,030.40, payable in equal semi-annual instalments of \$716.45 $\frac{1}{2}$ , on the 1st of April and October, in each year, beginning with the 1st of October 1852, and that the basis assumed by him, was the same which had been assumed by all his predecessors, viz: the sum of \$30,000, and that no claim was at any time made

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upon Stewart for the raising of any additional sum as interest or charges. That as early as October 1852, the assignees of the grant, and among them the petitioner, were notified of the sum so ascertained and settled by Commissioner Stewart, and when so notified, and the petitioner and the other assignees recognized the correctness of the ascertainment by receiving the sums payable accordingly. That on the 1st of October 1853, the commissioner drew on the contractor for \$716.45, in three drafts, one of which, for a fourth thereof, was so drawn in favor of the petitioner, and paid by the contractor on the endorsement thereof by the petitioner. That the same thing was twice repeated in 1853, twice in 1854, twice in 1855, and twice in 1856, in regard to the petitioner and the other assignees, each receiving and endorsing his separate drafts. That the petitioner did not object till in the term of the commissioner who went into office in 1854, and that another of the assignees did not object till 1856, and that the third (who owns half the grant) has never objected. That the State Commissioner never asked of the commissioners of this grant, or their assignees, anything more than what is contained in two letters addressed to them in December 1851, which show that the State officers merely requested a proper assignment to be executed from the commissioners named in the grant to their assignees. That in January 1852, a copy of the decree mentioned in the petition was recorded in the office of the Commissioner of Lotteries, with an assignment thereon by Tome to Vandiver, and he files a full record of the proceedings in the case in which the decree was passed. That this decree, if binding at all, is binding only on the parties to it, and does not conclude respondent, or the interests he represents. That upon the face of the proceedings, as well as otherwise, the decree is erroneous and irregular, and is of no force or validity whatsoever, for the purpose for which it is relied on, of settling the amount payable on said grant by the State Commissioners, and that it has never been recognized for any such purpose by any of said commissioners. He further pleads that the remedy sought is not appropriate, and that the contractor, France, ought to be a party to any proceedings in which his interests are so involved as in the claim now set up.

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The record of the case in which the decree relied on was passed, shows that the complainants in it are Wilmer, Heckart (the petitioner) and Tome, and the defendants, Smith, Roman and Anderson, commissioners named in the act of 1839. The complainants there allege, among other things, that since the consolidation of said lottery grant with the State lotteries, the commissioners named in said grant have received, in virtue thereof, the sum of \$18,368.78, and have expended, in and about the execution of the said lottery grant, and in the performance of their duties as commissioners, the sum of \$8400, leaving a net sum, over and above expenses, amounting to \$14,968.78, which they have paid over to the complainants, and that there is still due and accruing to them the sum of \$15,934.22, which is to be raised by the State Lottery Commissioners. The answer of the defendants, which was accepted without oath, admits the allegations of the bill, and consents to a decree which was passed on the same day the bill was filed, (20th December 1851,) and is worded as set forth in the petition.

The court (LEE, J.,) refused the application and discharged the rule, and from this decision the petitioner appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BAETOL, J.

*Note.*—In the argument of the cause, the counsel for the appellee waived all objection to the form of action, and that question was not discussed.

*Wm. P. Whyte* for the appellant:

The act of 1839, expressly required \$30,000 to be raised, exclusive of *all charges and interest*; that is, \$30,000 were to be actually paid for building the lock. It matters not what the answer alleges in relation to the entry on their books, in 1844, by the Lottery Commissioners, that the sum of \$30,000, and no more, was to be raised, because at that period no charge whatever could have accrued against the grant, inasmuch as no contract was made for building the lock till 1847,

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and, of course, the payments made to the commissioners named in the grant, were merely on account, and as there was then no limit to the period during which lotteries could be drawn in the State, any deficiency could be made up afterwards. The act of 1839 contemplates the payment of *charges* and *interest* exclusive of the \$30,000. The contractors for building the lock had to look to the commissioners named in the act for the fulfilment of the terms of the contract, which was to transfer to them the \$30,000, *free of all charges*, of which charges *those commissioners were the sole judges*, and to get a proper assignment of the grant, the decree relied on was obtained from a court of competent jurisdiction, between proper parties, and adopted, sanctioned and enrolled upon the records of the State Lottery Commissioner's office. This decree cannot be questioned in *this proceeding*, but is final and conclusive of the question adjudicated, and cannot be impeached on the ground of informality in the proceedings, or error or mistake of the court in the matter adjudicated. 2 H. & G., 50, *Raborg vs. Hammond*. 3 Md. Rep., 54, *Ranoul vs. Griffie*. 9 Gill, 222, *Powles vs. Dilley*. 1 Greenl. on Ev., sec. 551. If the decree was not correct, it should not have been adopted and recorded as a valid assignment, and before the new contract was made, it was before the commissioner to guide him in his estimate of the amount to be raised before April 1st, 1859. The new contract does not call for the payment of any specific sum, but to pay *all sums* authorized to be raised by the lottery grants, that they might be *wholly* paid off. Such was the express direction of the constitution, and the act of 1852, ch. 113. The objection, that the parties to the suit are the only persons bound by the decree, is not tenable, for, in the case of a suit on a trustee's bond, the defendant cannot question the correctness of the original decree for a sale, nor the order distributing the purchase money. 2 Gill, 439, *Richardson vs. State, use of Rawlings*. The State Lottery Commissioner held a similar position to the appellant. But if the decree were not conclusive, and the question of charges could be investigated, *who* are to be the *judges* of the charges, save the *commissioners under the act of 1839*. They

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gave bond for the performance of the duties; they made the contract for building the lock; they superintended its construction, and they are entitled to charges. Whatever may be the policy of other States, it is the settled policy of this to pay all agents employed in the public service. The State Lottery Commissioner is paid for drawing the lotteries. The Visitors of the Penitentiary are paid. The Commissioners of Public Works are paid. Laws are passed, during each session of the Legislature, paying persons for special services to the State. The case in Delaware, of *State vs. Platt, 4 Harrington*, 163, is not applicable to this, as the parties deducting "*expenses*" there were the Trustees of the College, and had parted with possession of the entire grant, and they had no duties to perform.

*J. Mason Campbell* for the appellee:

The unexhausted amount of the grant claimed by the petitioner, was rightly fixed, by Commissioner Stewart, at \$10,030.40. The original sum to be raised was \$30,000, free and clear of all charges and interest whatsoever. Neither the commissioners of the grant, nor its assignees, nor any one, ever has made any claim to the raising of any sum for interest or charges, nor does the petition in this case disclose that there were charges incurred or interest paid. The sum of \$30,000, then, which has been exclusively adopted, and, till within a short period, assented to by all parties as the sum to be raised, is all that the present petitioner can claim. The very decree itself, on which he relies, expressly affirms the same thing, and describes the grant as one for "*\$30,000, authorized by the act of 1839, ch. 234, to be raised.*" This sum being settled, the only question is, what portion of it had been raised when Commissioner Stewart made the contract, under the new constitution, to raise the residue? The full record filed by the defendant, of the proceedings in the cause in which the decree was passed, ascertains this by the admission of the petitioner himself, he being one of the complainants in that cause. That bill states the sum raised and paid to the commissioners of the grant, before the assignment made by them, at \$18,368.78,

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and the present petition sets out the amount paid, after the assignment and before the new contract, at \$1603.83, making \$19,972.62, which, deducted from \$30,000, leaves \$1027.40 as all that remained to be raised, which is \$3 less than the amount fixed by Commissioner Stewart. Nor is it any answer to this simple and conclusive statement, that the bill which admits the payments prior to the assignment, claims also that there was paid away \$3400 of that amount, so as to leave a net receipt, on that hypothesis, of only \$14,968.78. It is not stated for what the \$3400 was expended, nor is there any proof in the record on that point. That bill was filed by the parties entitled to an assignment of the grant, the present petitioner being one of them, against the commissioners of the grant, for an assignment of it. There was no reason for any such proceeding. The commissioners were willing to assign, and could have assigned, without any decree. The bill, as filed, was admitted without oath or proof, and a decree passed. The State Lottery Commissioners were no parties to the proceeding, and it is of no force as against any one but the parties to it. The decree itself, however, by a strange oversight of the parties, makes a statement fatal to the claim which it was possibly the object of these strange proceedings to accomplish, for it denies any right to raise more than \$30,000. But, again, the acquiescence of the assignees in the amount settled by the Lottery Commissioner, is not only itself conclusive testimony to the correctness of the *ascertaintment*, but also a bar to the present proceeding.

J.E GRAND, C. J., delivered the opinion of this court.

This is an application for a *mandamus*. Whether or not it should issue, depends, in our judgment, upon the construction which ought to be placed upon certain acts of Assembly.

The act of 1839, ch. 234, (after an allusion to a previous act,) in its first section, provides, that for the purpose of building an out-let lock at Bell's ferry, opposite Port Deposit, on the Susquehanna canal, certain named persons were appointed commissioners, "with full power and authority, by a *scheme* or *schemes* of lottery, and the *sales* thereof, or of the *tickets*

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therein, and without being subject to *any tax whatsoever*, to raise the sum of \$30,000, *free and clear of all charges and interest whatsoever.*"

By the act of 1842, ch. 74, the grant of the act of 1839 was consolidated with the State lotteries. This act directed the Commissioners of Lotteries to pay to the commissioners named in the original act, or appointed in pursuance thereof, a ratable proportion, semi-annually, of the sum authorized by the original act.

The act of 1852, ch. 113, gives to the Lottery Commissioner, under the present constitution of the State, the power of the commissioners under previous legislation, and by its fourth section provides, "that the Commissioner of Lotteries, on the maturity of each instalment for distribution, *shall divide and distribute* the same, *pro rata*, amongst the persons and bodies corporate or politic *entitled to receive the same.*"

The petition alleges, that in the year 1847, the commissioners mentioned in the act of 1839, contracted with certain parties for building the lock, and all moneys arising from the lottery authorized by the act of 1839; that the lock was duly built and completed, according to contract, and the contractors assigned their interest in and to said lottery grant to certain persons, in certain proportions, and that among these assignees is the appellant, with interest in the proportion set out in his application for the *mandamus*; that the Lottery Commissioners refused to recognize the assignees until some legal proceedings were taken to make a proper transfer of said lottery grant to the assignees, and a direction from a proper court to the commissioners, ordering the payment of the sum ascertained to be due to them. The petition then avers, that because of this refusal of the Lottery Commissioners, a proceeding was had in the Superior Court of Baltimore city, whereby it was decreed that the complainants "be entitled to receive from the State Lottery Commissioners, and their successors, such sum, semi-annually, as amounts to the proportion of said lottery grant, out of the proceeds of the State lotteries, until the said complainants receive the sum of fifteen thousand dollars and ninety-two cents, being the *residue* of the thirty thousand dol-

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lars authorized by said act of 1839, ch. 234, to be raised, *after deducting what has been paid to the said defendants, over and above their expenses.*"

To this petition the defendant, admitting the passage of the several acts of Assembly, proceeds to give his opinion of the legal effect of certain acts, both of commissioners under the old constitution and those who were named in the legislation in relation to the grant for the lock, and also of the contractors and assignees. He avers that his predecessor did not recognize the obligation to raise, under the grant, more than thirty thousand dollars, and that, with this understanding of his duty, he made semi-annual distributions on this basis.

At the time the decree was passed, Messrs. Wharton and Dickenson were the commissioners. On the adoption of the new constitution, they were succeeded by Mr. Stewart, and he by Mr. Roberts, and Mr. Roberts by the present appellee. From this statement, it must be apparent the appellee, as Lottery Commissioner, has no personal knowledge of the earlier circumstances attending the grant; his knowledge, as such, is only derivable from his experience since he became commissioner, and from what the records of the commissioners who preceded him disclose. His own personal knowledge, as such, only evidences the fact that the appellant received a sum on a basis which excluded "expenses" as ascertained by the decree, and did so under protest. His construction of the legal operation of the acts of the Superior Court, and of those of the commissioners under the old constitution, can have no influence, because they are matters of law, and not of fact.

On this state of case, the question is, ought the writ to issue? We are of opinion it should. It must be recollected, that under the act of 1839, (the one authorizing this grant,) the commissioner therein named and authorized by it to be appointed, *so far as this particular grant is concerned*, had as much power as had the State Lottery Commissioners over grants placed, by other acts of Assembly, under their direction, and subject to their control. So far as this grant was concerned, the act of 1839 was, *pro tanto*, a repeal of the authority conferred on the State Lottery Commissioners; and what

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the latter could do in regard to grants placed under their jurisdiction, the act of 1839 authorized its commissioners to do in reference to the particular grant. They were empowered to raise, for the specified purpose, \$30,000, "free and clear of all charges and interest *whatsoever*." This was their power. Now, who was to determine whether \$30,000 was raised, "free and clear of all charges," &c? Certainly themselves, and none others. If this be not so, then by what authority did the Lottery Commissioners determine? If one set had not the power, then the other had not, for the power over the particular cases is the same, and derived from the same source, namely, acts of Assembly. Of course we allude to cases free from fraud, for in such cases the ascertainment, as in all other cases, when proved, would not avail against parties in interest. But there is no fraud alleged in the case at bar, the defence being, simply, that the decree of the Superior Court is not binding, and that there is no proof of any expenses beyond the \$30,000 authorized to be raised. If the decree be binding, then this objection is of no force, because the decree concludes the party from availing himself of it in this proceeding. We are clearly of the opinion that the decree and the entry of it with the assignment on the books of the Lottery Commissioners, did conclude them, because the court passing the decree was one of competent jurisdiction, and because the parties to it were the only parties whose interest, in the then posture of affairs, was involved. The contractor not being nominally a party to this proceeding, whatever position he may, in reality, occupy toward it, we abstain from comment on the terms of his contract. We are to be understood as saying nothing in this opinion as concluding any rights he may have under his contract.

By the act of 1839, the State empowered certain enumerated persons to perform and fulfill a trust; the object to be accomplished (viz: the construction of the lock) was to be accomplished under their supervision and direction; and the expenses to be incurred, and the interest to be paid, were to be ascertained and paid by them. Their appointment by the Legislature entitles them to an exemption from the charge of

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having abused their powers, unless such a charge be supported by proof. In the absence of all evidence to the contrary, the presumption must be, that they have ascertained the amount of interest and expenses correctly. Besides, under the act of 1842, ch. 74, sec. 2, they were compelled to give bond for the faithful discharge of their duties.

The State Lottery Commissioners were, by the act of 1842, charged with the duty of drawing the lottery, and paying over to the commissioners named in the grant, the money authorized to be raised. Nowhere do we find any power or authority conferred upon them to supervise the acts of the special commissioners, or to make the ascertainment of the amount of expenses and interest incurred. They were directed to apportion the money raised among the several consolidated grants; but the distribution was to be made, so far as the grant in question is concerned, upon the basis ascertained by the special commissioners. In this case the decree was such an ascertainment, made by the proper parties, and if made *bona fide*, is conclusive of the question. If there was collusion or fraud in the ascertainment, a corrective may be applied, so as to prevent the abuse of the powers and privileges granted; the proceedings before us show neither.

*Judgment reversed, writ ordered,  
and procedendo awarded.*

(Decided June 14th, 1858.)

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### SAMUEL E. SCHINDEL *vs.* ANDREW J. SCHINDEL.

A wife living in a state of separation from her husband, cannot be regarded as his *agent*, and has no authority to bind him by any *contract*, except for necessaries: she cannot *authorize another to enter his house*, and take therefrom the household furniture.

The object of the recent acts of Assembly of this State, in reference to the property of married women, was to *protect* the property of the wife from the *debts* of the husband, and, during life, secure its enjoyment to the wife:

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they confer on her no right to separate from her husband without cause, and remove from his custody all her personal property.

In an action of trespass *de bonis asportatis*, payment of the judgment against the defendant, confers on him the ownership of the property taken, and therefore the measure of damages is its value at the time of the asportation.

In such an action the jury may consider any facts and circumstances accompanying and giving color to the trespass, for the purpose of increasing the damages; the motives which induce a tortious act, are always matters for the consideration of the jury.

#### APPEAL from the Circuit Court for Washington county.

This was an action brought by the appellee against the appellant, to recover damages for an alleged trespass committed by the defendant, in entering into, and taking and removing from the plaintiff's dwelling-house, in Hagerstown, a large quantity of furniture, and other articles of personal property, particularly described in the declaration. Pleas, *not guilty* and *license*.

The facts of the case are sufficiently stated in the opinion of this court. *Three exceptions were taken by the plaintiff*, which need not be stated; and *one* by the *defendant*, as follows:

*Exception.* Upon the whole testimony, the plaintiff asked seven instructions, in substance as follows:

1st. That if the jury believe, from the evidence, that defendant, without the leave or authority of the plaintiff, entered the dwelling-house mentioned in the declaration, and that the plaintiff was then possessed thereof, then the plaintiff is entitled to recover of the defendant therefor; that such an entry would be a trespass on the part of the defendant as against the plaintiff.

2nd. If the jury believe, from the evidence, that the plaintiff was possessed of the dwelling-house mentioned in the declaration, and of all such personal chattels as were therein, and that defendant, without the leave and authority of the plaintiff, entered therein, and took out and carried away therefrom, divers of such goods and chattels, such as are described in the declaration, then the plaintiff is entitled to recover; and if they further find that defendant has never returned to the plaintiff

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nor replaced said goods and chattels, then the legal and proper measure of damages therefor is their true value, as shown by the evidence, at the time they were taken and carried away.

3rd. If the jury find the facts as stated in either of the preceding prayers, then, for the purpose of increasing the damages, they can consider any facts and circumstances that may be in proof before them, if any, that accompanied and gave character to the trespass, and which showed aggravation in the commission of the same.

4th. If the jury find that defendant took out of the plaintiff's dwelling-house, without his authority or consent, divers of the goods and chattels found therein, which were, at the time, in the plaintiff's possession, and that they were taken to another house, where the plaintiff's wife was then, and has ever since been, living, in a state of separation from, and without the consent of, her husband, and that upon being taken to said house, they have been used as well by the defendant and his family as the plaintiff's wife, then the plaintiff is entitled to recover of the defendant the value of the goods so taken and carried away.

5th. If the jury find that the plaintiff's wife, Lavinia E. Schindel, was living separate and apart from her husband, and in the house with the defendant, at the time the alleged trespass by the defendant was committed, the fact of such separation and living apart did not clothe her with any power or authority to interfere with the property or rights of her husband, or to license or authorize others to do so, there being no evidence before the jury showing a legal justification, on her part, in leaving and living separate and apart from her husband.

6th. If the jury find that defendant entered the plaintiff's dwelling house, and took and carried away therefrom the goods and chattels of the plaintiff, in his absence, then it is not competent to the defendant to justify such entry and asportation by the leave or authority of the plaintiff's wife, to him given for that purpose.

7th. That there is no evidence in the cause from which the jury can find that the plaintiff's wife was the authorized agent

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of the plaintiff, at the time of the alleged trespass, to employ and procure the defendant to take and remove the goods and chattels of the plaintiff from his dwelling-house to the house in which the defendant was living, or to any other house or place, or for any purpose.

The defendant, at the same time, submitted *five* prayers, in substance as follows:

1st. If the jury find, from the evidence, that the plaintiff's wife removed the goods mentioned in the declaration from the plaintiff's house to that of Mrs. Emmert, and that she at that time there resided, and that, in said removal, the defendant assisted her at her instance and request, and that said goods, upon said removal, if so found, continued to be and were, at the commencement of this action, in the possession of the plaintiff's wife, then the same may be considered by the jury in mitigation of damages.

2nd. If the jury find that the defendant removed the goods mentioned in the declaration from the plaintiff's house to the residence of his wife, at Mrs. Emmert's, and that this was done by the defendant at her instance and request, and she being present at the doing thereof, and directing the same, and that said goods, upon said removal, if so found, continued to be and were, at the commencement of this action, in possession of the plaintiff's wife, at said residence, then the jury may consider the same in mitigation of damages.

3rd. If the jury find that any portion of said goods, and whatever it may be, was the property of the plaintiff's wife, at the time of her marriage with him, and that the same was removed from his house, as stated in the two preceding prayers, and that the same continued to be and was, at the commencement of this action, in the possession of the plaintiff's wife, then, as to that portion of the goods and chattles so found, the same may be considered by mitigation of damages.

4th. This prayer asserts that the jury may, in mitigation, award but *nominal damages*, if they find the facts stated in the defendant's *first* prayer.

5th. If the jury find that any portion of said goods, and whatever it may be, was the property of the plaintiff's wife,

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at the time of her marriage with him, and that the same was removed, as stated in the defendant's first prayer, and the same continued to be and was, at the commencement of this action, in her possession, then, as to such portion of said goods, the jury may, in mitigation, award but *nominal damages*.

The court (PERRY, J.) granted all the plaintiff's prayers except the *seventh*, which was refused, and rejected all of the defendant's as asked, but granted the first three with this qualification: "that the facts set out in said prayers may be considered in mitigation of any circumstances, if any there be, that could entitle the plaintiff to exemplary damages, if the jury find that a trespass, in fact, was committed by the defendant, as alleged."

The defendant excepted to the granting of the plaintiff's *second*, *third*, *fourth* and *fifth* prayers, and to the refusal of his own prayers as asked, and to the granting of his first three prayers with the above qualification. The verdict and judgment were in favor of the plaintiff for \$629.50, damages and costs, and the defendant appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*Wm. T. Hamilton* for the appellant:

1st. The plaintiff's *second* and *fourth* prayers are vicious, because they require the jury to find the value of the property taken as the measure of damages, disregarding the continuing possession of the plaintiff's wife, or her interest in it, as shown by the proof. The possession of the wife is the possession of the husband, and the jury are here required to allow the plaintiff the full value of that which he possessed at the institution of the suit. Again, much the largest portion of the property taken, belonged to the plaintiff's wife at the time of her marriage, and, under the act of 1853, ch. 245, is her separate property. A married woman can deal with her separate property, and yet, notwithstanding this, and her possession of it, the jury are required to allow the plaintiff its *full value*. The *third* prayer relates, in part, to the *second*, and depends upon its sufficiency.

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2nd. The plaintiff's *fifth* prayer goes to the whole trespass, and ought not to have been granted: 1st, because it assumes the plaintiff's wife had no right to interfere with his property or rights, or authorize others to do so, and, upon this assumption, asserts that the *fact* of separation did not clothe her with it; 2nd, because it denies to the jury the consideration of any right of the plaintiff's wife to enter upon his premises, or as such, or as agent, express or implied, to authorize others to do so; 3rd, because it denies to the jury the consideration of any right or power of the wife to deal in any manner with his goods, and, further, denies any consideration of the right of the wife to deal with her separate property; and 4th, because it may mislead the jury, by placing the trespass and its denial or justification upon the *fact of separation*, and then instructs the jury that there is no evidence of a justifiable separation on the part of the wife.

A wife cannot commit a trespass as against her husband; she cannot steal from him. *Bac. Abr. Title, Baron & Feme (G.)* The authority of the wife may justify an entry into her husband's dwelling; also familiar intimacy in a family may justify an entry, so as to deprive it of the character of a trespass *ab initio*. And the wife may sell, or give and deliver the goods of her husband to a stranger, who may carry them away, and *trespass* will not lie, but *trover*. 1 *Bl. Com.*, 442, note. *Selwyn's N. P.*, 1359,

The *sixth* prayer is also wrong, for the reasons above stated, and also for the additional reason, that it puts the whole question of the agency or authority of the wife to allow entry or asportation on the fact of the *absence* of the plaintiff at the time, so that if the jury found absence on the part of the plaintiff, they must discard all authority on the part of the wife, and find a trespass.

3rd. The *first, second* and *third* prayers of the defendant go to the mitigation of the damages generally, and ought to have been granted: 1st, because the wife can deliver the goods of her husband to a stranger, and *trespass* does not lie, for the wife having a power over her husband's goods, the possession was lawfully obtained; 9 *Bac. Abr.*, 476, *Title Trespass (E;)*

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1 *Bl. Com.*, 442, note. 2nd, because the possession of the wife is the possession of the husband; 2 *Bac. Abr.*, 61, *Title, Baron & Feme (K.)*. Unless allowed in mitigation, the plaintiff would obtain the full value of the property, and have the property itself by the possession of his wife. The verdict and judgment for the value of the property, and satisfaction, vests it in the defendant, and the property being in the possession of the plaintiff, and belonging to the defendant, the plaintiff would be liable in an action for it. The jury ought, therefore, to have been permitted to consider this possession in the plaintiff in mitigation of damages, and without the qualification made to these prayers by the court. 3rd, because the wife can deal with her separate property. *Clancey on Husband & Wife*, 355. A large portion of this property belonged to the wife, at the time of her marriage, and this, under the act of 1853, ch. 245, is her separate property. In the case of *Unger vs. Price*, 9 *Md. Rep.*, 558, this court has said, that this act has materially modified the law as to the rights of the husband over the property of his wife, "and the whole scope and purpose of the law seem to be to invest a married woman with the powers of a *feme sole*, with reference to such property as she may be authorized to hold and enjoy to her sole and separate use." This decision, therefore, clothes the wife with the powers of a *feme sole*, over the property which she had at the time of her marriage, and, having such power, she could order it to be removed, as was done by the defendant in this case. In an action of trespass, the defendant, in mitigation of damages, may prove that the goods did not belong to the plaintiff, and that they have gone to the use of the true owner. 9 *Pick.*, 551, *Squire vs. Hollenbeck*. 3 *Zabriskie*, 342, *Hopple vs. Higbee*. 4th, because the facts stated in these prayers are proper for the consideration of the jury, in mitigation, as showing the intent, conduct and interest of the defendant. 2 *Saunders Pl. & Ev.*, 1121, 1122.

4th. Upon the principle involved in the consideration of the foregoing prayers of the defendant, his fourth and fifth prayers are correct, and ought to have been granted. The jury, by these prayers, were allowed to find but nominal damages, as

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contradistinguished from the plaintiff's second prayer, which required them to find the true value of the property. The plaintiff's seventh prayer was properly rejected; for there was evidence applicable to the issue. To warrant such an instruction, there must be no evidence applicable to the issue, or tending to prove any material fact. 2 H. & G., 183, *Ferguson vs. Tucker*. 12 G. & J., 236, *Gray vs. Crook*.

*Richard H. Alvey*, for the appellee: \*

1st. As to the second and fourth prayers granted by the court below. If the jury found, as doubtless they did, the facts according to the hypothesis of these prayers, there could be no question as to the right of the plaintiff to recover. The question could only be as to what was the legal measure of damages for the goods asported and converted. Did the court err in its standard of damages, as fixed by these prayers? I submit that it did not. There is nothing in either of these prayers to distinguish the case from the ordinary one of a mere stranger invading the rightful possession of property, and converting it to his own use, without the least authority or justification. In all such cases the party injured is, at least, entitled to recover the value of the property taken and converted. 5 *Mees. & Wels.*, 351, *Martin vs. Porter*. 9 *Mees. & Wels.*, 672, *Wild vs. Holt*. 6 *Pet.*, 262, *Conrad vs. The Pacific Ins. Co.* 76 *Eng. C. L. Rep.*, 692, *Reid vs. Fairbanks*. To fix a measure by which the injured party could recover less than the full value of his goods, would be to suffer a *tortfeasor* to take advantage of his own wrong, and, instead of making the recovery operate a punishment on him, would inflict the grossest hardship and injustice upon the innocent party, and confer an actual benefit upon the lawless invader of right; for, by the recovery in trespass for the conversion of goods, and the payment of the judgment by the defendant, the goods become the property of the defendant, absolutely, as if he had regularly purchased them. 5 *H. & J.*, 211, *Hepburn vs. Seewell*. It therefore results, as a legal consequence, and from the commonest rules of justice, that nothing less than the full value of the goods should be given. And so uniformly is

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the rule applied, and so determined is the law against *tortfeasors*, that even a party having a mere temporary possession of goods for a limited time or purpose, as against a stranger who disturbs such possession and converts the goods, he will be entitled to recover in trespass their full value, without reference to any reversionary rights. 9 *Gill*, 7, *Harker vs. Dement*.

2nd. As to the plaintiff's *third* prayer. The law has long since been well settled, that the plaintiff, in an action of trespass, may give in evidence, for the purpose of enhancing the damages, the circumstances which accompanied and gave character to the wrong done. Such facts and circumstances as show an evil motive or intent, are considered in aggravation. The *quo animo* is material. Besides any inconvenience and injury occasioned to the plaintiff, by taking the goods away under the particular circumstances of the case, are proper to be considered in estimating the damages to the plaintiff and the punishment to the defendant. The instruction in question simply informed the jury of a principle of law too clear for dispute, and which they could apply, or not, as they found the facts to exist. 7 *H. & J.*, 67, *Shafer vs. Smith*. 2 *Greenl. on Ev.*, sec. 272.

3rd. As to the plaintiff's *fifth* and *sixth* prayers. The fact of the plaintiff's wife living apart from him, certainly clothed her with no extraordinary rights or power over the property of her husband, but rather divested her of all power. Any agreement entered into by the wife, without the express or implied consent of the husband, would be absolutely void, and the husband could maintain trover or trespass for any goods of his, or to which he might have the right of possession, which the wife had sold or disposed of, without his consent. 1 *Sid.*, 120. 1 *Lev.*, 4, *Manby, et al., vs. Scott*. 2 *Atk.*, 452, *Oldham vs. Hughes*. 2 *Wilson*, 3, *Roberts vs. Pierson*. 8 *Term Rep.*, 545, *Marshall vs. Rutton*. 2 *Bos. & Pull.*, 105, *Beard vs. Webb*. 1 *Bl. Com.*, 442, and note 42. While the wife resides with her husband, she has power, as agent, to purchase on his account the ordinary articles for domestic and family use, so long as the husband's acquiescence can be implied

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from his knowledge of the course of the wife's dealing, and other circumstances. But when the wife leaves her husband, and lives apart from him, without justifiable cause, she has no longer any right or authority to contract on his account, not even for *necessaries*, nor in any way to pledge his credit or compromise his rights. It is only when she leaves her husband by his consent, or for a legal and justifiable cause, that she is constituted an agent, by implication, with authority to purchase *necessaries* on the credit of her husband, and the purchasing of *necessaries* is the *only* thing authorized by this implied agency. *2 Kent*, 146 to 148. It is laid down as the settled law, in books of good authority, that where a married woman is found living apart from her husband, the *prima facie* presumption is, that it is neither in consequence of his improper conduct, or by his assent, and, therefore, it always lies on the person who gave her credit, to show what were the circumstances under which they separated. *Smith on Contracts*, 291. *5 Car. & Payne*, 200, *Reed vs. Moore*. *1 Moody & Mallin*, 18, *Mainwaring vs. Leslie*. So that the wife, by leaving her husband without justifiable cause, divested herself of all authority to affect him by any act or contract of hers; and certainly if she possessed no authority herself, she could impart none to others. But whether the wife was living with her husband, or apart from him, clearly she had no authority simply by virtue of her relation as wife, to license the defendant to interfere with, and commit a trespass upon, the property and rights of the husband, nor could such a license in any way avail to protect or justify the defendant. *Cro. Eliz.*, 876, *Holdringshaw vs. Rag*. *Ibid.*, 246, *Tayler vs. Fisher*. *Selv. N. P.*, 1040, *Cock vs. Worthham*. *5 Phil. Ev.*, 194. And whether the wife was living absent from her husband, with or without justifiable cause, was wholly immaterial. Under no circumstances, unless expressly authorized by her husband, could the wife give the defendant an available license. The court below, in granting these prayers, only determined what is clearly the well settled law, that the defendant could not justify under a license from the plaintiff's wife.

4th. As to the defendant's five prayers which were refused

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by the court below. They all embrace two propositions only: 1st. If the defendant acted under the direction of the plaintiff's wife, in entering the house and removing the goods, or, in other words, if the defendant was licensed by the wife, and that the wife, apart from her husband, has had the use and control of the goods since their removal, then the damages are to be mitigated, and, according to the fourth prayer, to be merely nominal. 2nd. If any part of the goods removed were goods belonging to the wife, before her marriage with the plaintiff, and, since their removal, have been in the possession of the wife, she living separate from her husband, then the damages are to be mitigated as to such goods, and, according to the *fifth* prayer, to be merely nominal. I contend that upon no principle could such prayers have been granted. It is clear, from the authorities already cited, that the defendant could not justify by showing a license from the wife. If the wife had no authority to license the defendant, and her sanction was wholly a void act as against the husband, upon what principle is it that such sanction or license of the wife could be matter of mitigation? It could as well be contended, in an action for *crim. con.*, or seducing away a wife or servant, that the consent of the wife or servant should be taken in mitigation of damages. But whoever heard of such a proposition being announced to a jury by any judge? The law proceeds upon a very different principle, and considers the wife *as having no power to consent*. 1 *Chitty's Pl.*, 167. Nor does it at all change or affect the case, that a portion of the goods removed belonged to the wife before her marriage with the plaintiff. By the marriage the goods became the property of the husband, so far, at least, as to entitle him to the possession and use of them as against all persons. The acts of 1842, ch. 293, and 1853, ch. 245, have no application to the case. They have not divested the husband of his right of property in the goods of the wife, at the time of marriage. By no construction have they divested the husband of his right to possess and enjoy such goods of the wife. All that they do, or were intended to accomplish, is to protect such property from the *debts* of the husband. The husband, then, having the right to possession and enjoyment,

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is entitled not only to sue for an asportation of the goods, but to recover their full value as the measure of damages, where, as in this case, they have been withheld and converted by the agency of the defendant. 9 *Gill*, 7, *Harker vs. Dement*. According to all the proof, the goods were removed by the defendant, and taken to another house, in which the defendant and his family resided, and continued to reside at the time of the trial, and in which the plaintiff had no control or dominion whatever, and even to enter which, according to the proof of the defendant himself, the plaintiff was forbidden.

LE GRAND, C. J., delivered the opinion of this court.

This action was brought by the appellee, to recover damages for a trespass alleged to have been committed by the appellant. The principal facts of the case, as developed both on the part of the plaintiff and defendant, may be thus stated: The plaintiff and defendant are brothers, and they married sisters; defendant, before, at the time, and since, lived in the house of, and with, his wife's mother. The plaintiff was married sometime in the month of May 1855, and went to house-keeping, and was separated from his wife within the same year. His wife, sometime in the fall of the year, left the house of her husband, and went to that of her mother, declaring that she could not longer live with him, as he treated her badly. The mother sent for the husband, and both she and his brother, the defendant, sought to reconcile the parties, but did not succeed in doing so. The husband and wife, however, lived at the house of the mother of the wife for about five days, when the husband went to the house of his father, which was situate about one and a half miles from Hagerstown. During his absence, the defendant, accompanied by others, employed for the purpose, entered his house, in Hagerstown, and took from it certain household and other furniture, and conveyed the same to the house of the mother of his wife, where it remained up to the time of the trial. Evidence was offered to show that this furniture, after its removal, was used in common by the family of the defendant, and that of Mrs. Emmert, the mother, and by the wife of the plaintiff, and, also, that the removal

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was by the direction and in the presence of the wife. There was also evidence that some of the property was that of the wife, prior to her marriage.

The plaintiff, during the progress of the trial, took exceptions to certain testimony allowed by the court to be adduced in behalf of the defendant. In the view we have of this case, it is not necessary we should advert to them, and the more particularly so, as the question which they present is raised by the prayers of the respective parties.

The instructions of the court must be construed in reference, exclusively, to the circumstances given in proof, and, therefore, it is no part of the duty of this court to consider the possible state of law as applicable to a state of facts not presented by the record. Whether or not a wife, while living and cohabiting with her husband, can commit a trespass on his property, or whether or not, while in such a condition, she can authorize a stranger to enter upon the premises of her husband and remove therefrom his property, are not questions now before us. The uncontested fact is, that at the time of the alleged trespass, the wife was living with her mother, apart and separate from her husband, without his consent, and contrary to his wish. And it is this state of case, and none other, with which we have to deal. It may be affirmed as undeniable, that there is no case (except one in which necessaries have been procured) where a wife is living separate from her husband, that she has been regarded as his agent. From wise and humane considerations, when the wife is free from blame, and living separate from her husband, she is permitted to bind him for her necessities. It is not necessary to specify the particular circumstances under which the contract of the wife will bind the husband, when she is living apart from him; it is sufficient to say, in every case, her authority is *limited* to the making of contracts for *necessaries*. There is no book or case to the contrary of this. The acts, therefore, of the defendant cannot derive a justification from any license or authority conferred by the wife of the plaintiff, while she was living apart from him.

But it is supposed that, inasmuch as there was proof in the

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case that some of the property removed was that of the wife, prior to her marriage with the plaintiff, our acts of Assembly, of 1841, ch. 161, 1842, ch. 293, and 1853, ch. 245, effected an enlargement of her power, and diminution of the right of custody of her husband, and, in fact, conferred upon her the authority to order the entry and removal complained of. We do not concur in this interpretation of the several acts of Assembly. With the soundness of the policy in which they originated, we have nothing to do; that was matter for the consideration, peculiarly, of the legislative branch of the government. Although this legislation has materially abridged the rights and power of the husband, we cannot bring our minds to believe it was the purpose of the Legislature, if not absolutely to annul the nuptial tie, to utterly annihilate, in every particular, the control and right of custody of the husband. So far as property is concerned, the object of those acts was to protect the property of the wife from the debts of the husband, and, during life, secure its enjoyment to the wife, free from the liabilities incurred by the husband; they confer on her no right to separate from her husband without cause, and to remove from his custody all her personal property. If she has been misused, and, in the judgment of a court of competent jurisdiction, she deserve it, adequate protection and allowance will be afforded, not only out of property owned by her previous to marriage, but out of the estate of her husband. But, to sanction the doctrine that a wife, from mere caprice, may separate from her husband, and live apart from him in such manner as may suit her passions and inclinations, and to deprive him of all marital rights, is nothing short of allowing a wife, at pleasure, to annul the marriage contract; in fact, to restore her to her original condition, with but one exception, the privilege of forming another matrimonial alliance. Such a state of things would be revolting to the moral sense of the community, and yet the sympathizing spirit of some well-meaning persons induce them to contend for postulates, which, in their practical consequences, would realize the disruption of civilized society. Of course we are not to be understood as intimating any such results were favored by counsel

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in argument of this case; but as only indicating that, in our opinion, the latitudinarian construction sought to be placed, by persons of generous tempers, upon our legislation, would, if sanctioned, achieve results no less shocking to them than to the rest of the community. Of so great dignity is the contract of marriage esteemed by municipal law and religion, that all others, in binding stringency, are held to be illimitably inferior. This being so, it would require much to convince this court that the Legislature designed more than to protect the wife against the crime, improvidence, or misfortunes of the husband. Such a purpose can be, and is, fulfilled by giving the construction which we have given to the several acts of Assembly.

The plaintiff presented seven, and the defendant five, prayers to the court, the former, save the seventh, were granted, and the latter refused. Of the latter, however, the first three were granted with the following qualification: "That the facts set out in said prayers may be considered in mitigation of any circumstances, if any there be, that could entitle the plaintiff to exemplary damages, if the jury find that a trespass, in fact, was committed by the defendant, as alleged."

The law contained in the plaintiff's first prayer is admitted. The second prayer of the plaintiff asks the court to instruct the jury that "the legal and proper measure of damages, as to the goods and chattels, is the true value thereof, as shown by the evidence in the case, at the time they were taken and carried away." This, we think, the court properly granted. The affirmance of the judgment in this case, and its payment, confer upon the defendant the ownership of the property taken by him, and, therefore, in any view of the case, ought he to pay its value at the time of the asportation. The third asked the court to say to the jury, they had the right to consider any facts and circumstances accompanying and giving color to the trespass, for the purpose of *increasing* the damages. This was clearly correct. The motives which induced a tortious act are always matters for the consideration of a jury. The man who, from bad and malicious intentions, commits a trespass, ought, in justice, to be dealt with more harshly than one

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who acts from no vicious feelings, but ignorantly. *Turner vs. Walker*, 3 G. & J., 377. The 4th prayer of the plaintiff only requires the jury to find an additional and unnecessary fact, namely, that the property removed, after its removal, was used in common by the defendant and the inmates of the house of the mother of the wife of the plaintiff. The proof is all one way in regard to this particular, and as the other prayers were properly granted, this supplementary fact required to be found by the jury, ought not, and did not, create any embarrassment with the court. The 5th, 6th and 7th prayers of the plaintiff, and the 1st and 2nd prayers of the defendant, relate to the orders given by the wife, and her agency; those of the plaintiff, denying the right of the wife to interfere, either because of her relation to the plaintiff as wife, or because of a supposed agency; and those of the defendant, claiming that the direction and superintendence of the wife of the plaintiff, if believed by the jury, ought to be taken and considered by them in mitigation of damages. We have already shown that a wife, situated as was the wife of the plaintiff, at the time of the removal, could not justify the trespass complained of, and, also, that because of the legal effect of the judgment in this case, the defendant acquires title to the property; it consequently follows, these three prayers of the plaintiff were properly granted, and those of the defendant rightfully rejected. To guard against misapprehension hereafter, as to the scope of this decision, we will observe, that in reference to negroes, as well as other personal property, our law recognizes the right of one person to have a life or lesser estate in such property, with a remainder over to another. Where the trespass consists of the asportation of property so situated, the owner of a life or lesser estate could only recover, *so far as value* is concerned, the value of the life or lesser estate, and the judgment would only confer on the defendant the interest of the plaintiff, without in any manner operating on the right of any other party. How the rights of parties so circumstanced are to be guarded, are questions which need not now be considered. The rejection of the plaintiff's seventh prayer furnishes no cause of complaint to the appellant. It ought to have been granted. It declares

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there is no evidence of agency on the part of the wife. The law confers none, and there is no proof of any having been given specifically; the fact is, the whole evidence negatives any such presumption. The defendant's fourth prayer was correctly rejected, and for the reasons we have assigned in regard to the operation of the judgment. The third prayer of the defendant asks that if the jury should find that any portion of the property taken was the property of the wife, prior to her marriage, that then, as to that portion of the goods, it should be considered in mitigation of damages. The meaning of this, if we understand it, is, that if the jury find the facts which constitute the alleged trespass, then, from the gross value of all the goods taken, should be deducted the value of the particular goods mentioned in the prayer. In speaking of the other prayers, we have stated several reasons why the principle asserted by this prayer is wholly inadmissible. The judgment and its payment gives him title to this, as well as to the other property, and there can be no reason why he should not pay for it. In whom *vest* the proceeds of the judgment, can be no concern of his, he pays only for that to which he acquires title. The qualification attached by the court to the first three prayers of the defendant was proper, for the reason we have given in treating of the plaintiff's third prayer.

*Judgment affirmed.*

(Decided June 15th, 1858.)

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### MORDECAI G. COCKEY, Garnishee of NICHOLAS LEISTER, *vs.* LEVI LEISTER.

Heirs at law executed a deed conveying to a trustee all the deceased's real estate, for sale and distribution, the latter to be made "under the direction of the Circuit Court, and all points of dispute as to advancement, or any other matter that may arise in the premises, to be *adjusted by said court.*" The trustee gave bond, under the act of Assembly, sold the property, and

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then filed a petition stating his proceedings, and asking the court to distribute the proceeds, but the fund was not brought into court. The case was referred to the auditor, who stated a distribution account, by which the sum of \$520.05 was audited to one of the heirs at law, who was a *non-resident*. This account was ratified *nisi*, but not *finally confirmed*. HELD: That this fund, in the hands of the trustee, was *not liable to an attachment* at the suit of one of the grantors in the deed, a creditor of the *non-resident*, another grantor, the proceedings being *still open*, and the fund liable to be brought under the control of the court.

Funds in the hands of a trustee, under a decree of a court of equity, to sell property, and account with the court for the proceeds, are *not liable to attachment*, but this rule does not apply where the fund has been distributed by the *auditor's account finally ratified* by an order directing application by the trustee of the funds in his hands *not brought into court*.

A trustee ought not to be subjected to the consequences of a multiplicity of suits, and may avail himself of the objection, without pleading specially, where the subject matter of the defence is presented by the plaintiff himself.

By our attachment laws, a garnishee has the right to appear to the action, confess judgment for the amount in his hands, and have his costs allowed out of that sum, and a person cannot be charged as garnishee where his legal relation to the fund is such that he cannot take advantage of this provision of the law.

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**APPEAL from the Circuit Court for Carroll county.**

*Attachment* on warrant issued on the 13th of November 1854, at the instance of the appellee, a citizen of Maryland, to affect the goods and chattels, rights and credits of Nicholas Leister, a *non-resident* debtor, and, on the next day, laid in the hands of the appellant, as garnishee, who appeared and pleaded *nulla bona*, upon which the case was tried.

In the course of the trial, *two exceptions* were taken by the garnishee to the rulings of the court below, (NELSON, J.) which, with all the facts of the case, are sufficiently stated in the opinion of this court.

The jury found, by their verdict, that, at the time of laying the attachment, and at the time of trial, the garnishee had in his hands \$400 of the rights and credits of Nicholas Leister, as alleged by the plaintiff in pleading, and judgment of condemnation, was rendered for the amount so found, and from this judgment the garnishee appealed.

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The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BARTOL, J.

*Wm. P. Maulsby* for the appellant, argued, that the court below erred in its rulings. 1st. Because the trust was created by the plaintiff and defendant in the attachment, and, by its terms, provided the mode of ascertaining the amount which would be due therefrom to either, which mode had not even been resorted to at the time this attachment issued, and had not been followed out to the end provided by the deed, at the time of the trial and judgment, and it is not competent to the plaintiff to claim the trust fund in any other way, or at any other time, than provided by himself by his deed. He is as much estopped from claiming against his own deed, as he is from asserting that his own deed is void against himself as creditor of another party to the deed. 2nd. Because an attachment will not lie against a fund in the hands of a trustee, at all events, so long as the trust remains open and unadjusted. 1 *G. & J.*, 463, *State, use of Oyster, vs. Annan.* 2 *Md. Rep.*, 284, *Scott vs. State, use of Ducker.* 5 *Md. Rep.*, 327, *Nelson vs. Howard.*

*Richard H. Alvey* for the appellee:

1st. Conceding the deed to the garnishee to be valid as against the creditors of the grantors, the defendant had clearly an interest under that deed, which was liable to the plaintiff's attachment. There was no want of certainty as to the interest of Nicholas Leister, the defendant. It was sufficient to maintain the attachment, that his interest was susceptible of being rendered definite and certain, as was done by the verdict of the jury. The evidence furnished by the garnishee's own proceedings, was ample and abundant to show, not only the interest, but the precise extent and amount of it that was liable to the attachment. The reasons assigned in the appellant's prayers, why the attachment could not be maintained, are altogether untenable upon the evidence in the cause. 2 *H. & McH.*, 463, *Wallace vs. Patterson.* 3 *H. & McH.*, 576, *Campbell vs. Morris.* 1 *H. & J.*, 536, *Steuart vs. West.*

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*Ibid.*, 546, *Davidson vs. Clayland*. 5 *H. & J.*, 312, *Ford vs. Philpot*. 6 *H. & J.*, 31, *State vs. Krebs*. *Acts of 1795, ch. 56*, and 1810, *ch. 160*. 2 *Md. Rep.*, 1, *Glenn vs. Gill*. *Ibid.*, 457, *Evans vs. Sprigg*. 3 *Md. Rep.*, 366, *Hertle & Wife, vs. Schwartz, et al.* 3 *Adol. & Ellis*, 99, *Roper vs. Holland*. The simple question to be determined in cases of attachment, under the acts of Assembly, and the decisions cited, is not whether there is a certain specific sum *ascertained to be due to the defendant at the time*, but whether the garnishee has in hands any money or rights of the defendant, subject to the payment of the debt. The evidence which the prayers conceded to be true, clearly established the fact that the garnishee held in his hands the funds of the defendant, and it then became the duty of the jury to ascertain, from the evidence before them, the amount of the rights so held.

2nd. But the deed to the garnishee, in this case, is void as against the creditors of the defendant, the same being to their prejudice, and calculated to hinder and delay them in the collection of their debts; and, if so, then clearly no question can be made here as to the condition of the trust, but Cockey, the garnishee, must be regarded as having the money in his hands, subject to the right of the creditors to attach it at any time. The trust is not for the benefit of creditors, but exclusively for that of the grantors in the deed, after supplying the deficiency of the personal estate of Abraham Leister, deceased, in the payment of debts due from his estate. 3 *Md. Rep.*, 11, *Green, et al., vs. Trieber*. *Ibid.*, 40, *Sangston vs. Gaither*. 8 *Md. Rep.*, 418, *Malcolm vs. Hedges*.

TUCK, J., delivered the opinion of this court.

The appellant was appointed trustee by a deed dated the 15th of July 1854, in which Levi Leister, the plaintiff, and Nicholas Leister were parties grantors, with the other heirs at law of Abraham Leister, for the purpose of selling his real estate, for distribution, after paying the expenses of the trust, and the balance of his debts not satisfied by the personal estate; the deed providing that the distribution should be made "under the direction of the circuit court, all points of dispute as to

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advancement, or any other matter that may arise in the premises, to be adjusted by said court." The appellant accepted the trust, filed his bond in the clerk's office, under the act of Assembly, and made sale of the property in September of that year, and in February 1855. On the 18th of September 1855, the appellant filed a petition on the equity side of the circuit court, setting forth his proceedings under the deed, and asking the court to distribute the proceeds of sale, but it does not appear that the fund was ever brought into court. An order was passed referring the petition to the auditor, and a distribution was afterwards made, by which Nicholas Leister was allowed \$520.05. This account was ratified *nisi*, but it does not appear to have been finally confirmed by the court. On the day designated for the final ratification, the trustee filed a petition craving allowance for certain expenses, which appears to have been the last proceeding in the cause; the order endorsed on this petition, not having been signed by the judge, we deem of no effect.

Meanwhile, however, between the date of the deed and the filing of the trustee's original petition, to wit: on the 13th of November 1854, the appellee, a creditor of Nicholas Leister, a non-resident, sued out an attachment on warrant, and laid it in the trustee's hands, to bind the debtor's interest in the proceeds of sale. The case was tried on the plea of *nulla bona*, and the verdict having been rendered against the garnishee, he appealed.

At the trial, the plaintiff relied upon the facts substantially stated above, as shown by the entire proceedings on the equity side of the court, and asked the court to instruct the jury that "whatever funds of the defendant, Nicholas Leister, the jury shall find, from the evidence in the cause, are in the hands of the garnishee, are subject to the attachment in this case," which prayer was granted. The garnishee offered two prayers, which were refused, to the effect, *first*, that the plaintiff was not entitled to recover, because he had adduced no sufficient evidence that any certain sum of money was in the hands of the garnishee, subject to the attachment; and, *secondly*, because the trust created by the deed remained unsettled, and no action

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at law could be maintained until a sum certain was ascertained to be in his hands, due to the defendant, by a final settlement of the trust.

The appellant is not in the attitude of a trustee in equity, appointed by a decree to make sale of property, and account with the court for the proceeds. In such a case an attachment will not lie to affect the trust funds in his hands. It was so adjudged as to receivers in the case of *Farmers Bank of Del., vs. Beaston*, 7 G. & J., 421. The reason of the doctrine there announced, applies with equal force to trustees in equity, and to funds of which they may have charge, and it was so held by the late Chancellor, in *Bentley vs. Shrieve*, 4 Md. Ch. Dec., 412. Property or funds so situated, are under the control of the court, and may be withdrawn at any time from the trustee's hands, in which event he could not respond to a judgment of condemnation, except out of his own estate, which would be manifestly unjust; and to allow one court to interfere in this manner with funds under the dominion of another, might not only produce confusion in settling the trust, but also lead to conflict of jurisdiction. Besides, a trustee, like a receiver, is appointed on behalf of all the parties, and if loss occurs, without his default, the estate must bear it. *Elliott vs. The U. S. Ins. Co.*, 7 Gill, 320. And it might happen that the judgment of condemnation would exceed the amount for which, on a statement of his accounts, the trustee would be liable to the defendant in the attachment suit.

We do not wish to be understood as applying this rule to a trustee in equity, where the trust fund has been distributed by the auditor, and his account finally ratified by an order or decree directing the trustee, with the funds in his hands, and not brought into court, to apply the same accordingly. See the *Act of 1831, ch. 321.*

This, too, is a conventional trust, to which the plaintiff and defendant were both parties, and which the appellant accepted on the terms mentioned in the deed; that is, that the fund should be distributed under the direction of a court of competent jurisdiction, by which not only the rights of the parties could be ascertained, but the trustee would be protected against

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the parties themselves. We gather from the deed that there were some matters of difference between the heirs at law of Abraham Leister, which they could not settle, or which they preferred to have adjusted by the court, and, for that amicable purpose, ordained this trust. Now if, instead of this mode, a bill had been filed by some, against the others, to have the land sold, and these questions determined in that form of proceeding, the attachment now sought to be enforced could not have been maintained against a trustee appointed by the court. Does it make any difference how the property becomes trust property, or how the trustee may be appointed, if the fund is to be distributed in equity? In either case the fund may be brought under the control of the court, and here one of the intended consequences of the deed was to place the proceeds of sale under its protection and jurisdiction, for, at the time of the trial, they were in that predicament.

It may be, as urged on the part of the appellee, that a person cannot, by creating a trust of this kind, for his own benefit, place his property beyond the process of his creditors, and delay and hinder the recovery of just demands, but this is not the question before us, for it does not appear that the defendant was indebted to the plaintiff at the date of the deed; on the contrary, his account bears date after that time, and there is no proof on the subject. Besides, the parties are not in that attitude. The plaintiff is himself a party to the deed, and has stipulated with the garnishee that the fund should be distributed in a particular court, where questions about advancement, and other matters of dispute, were to be determined, before it could be known how much, if anything, was coming to the defendant. And now he impleads the trustee in another court, where these questions cannot be adjudicated, and seeks to bind the fund in his hands, while the proceedings are still open in the equity court, and the account distributing the fund, for aught that appears, is yet liable to exception, and the sum awarded Nicholas Leister may be reduced by reason of some of the controverted matters which the trust was designed to have adjusted. In that case he might be required to pay more than the trust funds would meet; for, if pending this appeal,

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the equity court shall have ascertained that the defendant was advanced, or for any other reason was not entitled to the amount allowed him by the auditor's account offered in evidence, and this judgment should be affirmed, we are not aware that the garnishee would have any redress against its payment. A trustee ought not to be subjected to the consequences of such multiplicity of suits, and may avail himself of the objection without pleading specially, because the subject matter of the defence is presented by the plaintiff himself. 13 *Howard*, 335.

By the attachment laws, a garnishee has the right of appearing to the action and confessing judgment for the amount in his hands, and have his costs allowed out of that sum. We think that a person cannot be charged as garnishee, where his legal relation to the fund is such that he cannot take advantage of that provision in the law, and this we take to have been the predicament of the appellant; for, although the deed of trust showed that Nicholas Leister had an interest in the property, it was impossible for the garnishee to have confessed judgment until his proportion of the proceeds of sale had been ascertained by the equity court.

The cases cited are unlike the present. In that of *State vs. Krebs*, 6 *H. & J.*, 31, the proceeds of the land were in the hands of the commissioners, and the sum due the defendant in the action had been ascertained, when the attachment was laid. The court decided that the money might have been sued for by the husband, and that it followed, as a consequence, that it might be attached by his creditor to pay a debt due by him. The court had nothing to do with that fund; it was in the hands of the commissioners, and a proper subject of a suit at law. In *Hertle vs. Schwartz*, 3 *Md. Rep.*, 366, the fund in controversy was a purely legal claim, not depending on the proceedings of a court of equity. There is no doubt that equitable interests may sometimes be attached, as in *Ford vs. Philpot*, 5 *H. & J.*, 312, and other cases referred to; but where there is an unsettled trust, like the present, another doctrine prevails. In *Nelson, Excr. of James, vs. Howard*, 5 *Md. Rep.*, 327, a suit at law was maintained against the

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executor of a trustee, but the trust had been closed; and the trustee had promised to pay an ascertained balance due the *cestui que trust*.

It follows, from the views here expressed, that the court erred in granting the plaintiff's prayer, because there was no evidence to show that the defendant was liable in the attachment—the proof offered having had relation only to his possession of funds as trustee—and, as to the defendant's prayers, if he was liable as garnishee, he was only chargeable to the extent of Nicholas Leister's interest, as ascertained in equity, and this had not been determined:

*Judgment reversed, and no procedendo.*

(Decided June 15th, 1858.)

## MARY ROBINSON, AND OTHERS, VS. THE COUNTY COMMISSIONERS FOR HARFORD COUNTY.

A valuation of a convicted slave was made by the judge on the same day of the sentence, and nine days thereafter, and during the same term, the county commissioners filed a petition asking the judge to correct the valuation, upon the ground that it was erroneously made too high, for reasons stated, and the court passed an order setting the petition down for hearing, with liberty to the owners and the commissioners to take testimony. Under this order affidavits were taken and filed by both parties, and, upon them, the successor of the judge who tried the case, two years after the sentence, revised the valuation, and fixed it at a less sum. HELD:

That the county commissioners had the right to file the petition, and there was no error in the proceeding in reference to the second valuation, there being nothing to show that the delay was occasioned more by the fault of the commissioners than of the owners, and the succeeding judge having the same authority over the case as his predecessor.

The amount of the valuation, under the act of 1809, ch. 138, sec. 21, of a slave convicted of a felony, is a matter within the discretion of the court in which the case is tried, and, therefore, is not the subject of an appeal or of revision by the Court of Appeals.

The owners of such slave have no right to appeal from any action of the court in reference to the sentence of the negro, the State and the negro being the only parties who can ask the appellate court to review such action.

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The fact that a rule of court purports to be set out in one of the reasons filed with a motion to dismiss a petition, is not sufficient proof to the appellate court of the existence of such a rule.

As a general rule, the judgment of a court of record is, during the entire term at which it is rendered, under the control of the court, and liable to be stricken out, altered, or amended.

#### APPEAL from the Circuit Court for Harford county.

This appeal was taken by the owners from an order of the court below, (PRICE, J.,) in reference to the valuation of a negro slave, *convicted* of a *larceny*. All the proceedings and facts in the case are fully stated in the opinion of this court.

The cause was argued before LE GRAND, C.J., ECCLESTON, TUCK and BARTOL, J.

*Otho Scott* for the appellants:

The questions in this case are not to be settled by precedents. This is the first attempt, that I am aware of, to set aside the valuation of a convicted slave. The act of 1809, ch. 138, sec. 21, requires the court, *immediately* after conviction, to value the slave, and the law makes this valuation conclusive. There is no mode of revision. Whether a judge, if he ascertains his valuation was grossly wrong either way, that is, too high or too low, might not immediately correct it, is not discussed. This is not such a case. Here the application for revision was not made till a month afterwards, nor until the court had risen, and the second valuation was not made until two years after the conviction. If Judge Constable had revised his own valuation, there would have been more of plausibility in it, though it would seem that he would have had no more right to do so than a jury of inquest would have to alter their verdict a month after. But for another judge, two years afterwards, to modify the valuation, and sentence the negro anew, seems to be without precedent or principle. The judge who tries the case has the negro before him, values him from personal inspection and inquiry made at the time. This furnishes a much better opportunity for forming a correct judgment than an inspection after two years' imprisonment. The

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law intends the negro to be valued at the time of the sentence, and necessarily by the same judge; it says *immediately*. Suppose a special judge to try, would another judge have, two years after, a right to rescind the sentence and valuation? Judge Constable, by his order of the 2nd of December, did not rescind the sentence. The negro was sentenced on the 23rd of November 1853, and Judge Price set aside the sentence two years after. He had no power to disturb the judgment, and could not make a *valuation immediately thereafter*.

In favor of the first valuation we have the opinion of Judge Constable, the affidavits of Hays, Campbell, Burke, and others. Campbell, who deals in negroes, and knows more of their value than any other witness, says the negro was worth, in his then condition, \$750. Dallam, the sheriff, was offered \$500; so that it will be seen, by the proof, that the valuation was not too high. A convicted negro is valued as if his morals were good. If it were otherwise, as some of the witnesses evidently suppose, then a murderer, or other atrocious offender, would not be valued at any thing. Convicted negroes are always valued at the "price the traders give for negroes of similar qualities which have not been convicted." But few, if any, of the States allow convicts to be introduced. Hence conviction injures the sale, though it does not affect the valuation. If a negro is to be hung, he is valued as if he were a slave in the market, free from crime. The amount a convict sells for, therefore, is no test of value; it is common for them to sell for less than half what they are valued at. Reference to the affidavits will show that the valuation ought to have been \$750; the negro was one of uncommon value. Besides, in this case, the owner lost two years' services, worth, according to the uncontradicted testimony, \$100 per year, and this after the negro was convicted.

Again, as every one has notice of what is done in court, if such a proceeding as this could be had, it ought to be done within the time in which, according to the *rule of court*, motions in arrest of judgment, or for new trials, are allowed to be made. The valuation must be made at the time of the sentence, nor can the sentence be long delayed. The negro

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might die, escape from jail, and many accidents might happen which would deprive the owner of the value of his negro. As soon as the slave is found guilty of felony, his master loses him, and is entitled to his value. He is like property taken for public purposes. The law requires an immediate valuation, and its whole object would be defeated, if such revisions as that made in this case were allowed. The motion to dismiss the petition ought to have prevailed; that the overruling of that motion was error; and the new sentence and valuation is erroneous; and it is therefore insisted, on the part of the appellants:

1st. That the judge who passes the sentence must value the slave, and no other judge, at a subsequent period, can alter the valuation.

2nd. That the order of Judge Price was erroneous, because it professes to sentence the negro, when he had been sentenced two years before.

3rd. That the negro could not be valued two years after his conviction and sentence.

4th. That the petition to revise the valuation of the negro was not made in time.

5th. That the petition to revise ought to have been dismissed, for the reasons stated in the appellants' motion to dismiss it.

6th. That the valuation was not so excessive as to justify setting it aside.

7th. That the appellees, not being parties to the suit, had no right to file the petition.

*Henry W. Archer for the appellees:*

The appellants contend that our petition was not filed in time. Their counsel, in his argument, says it was filed one month after the judgment. The record, after reciting the judgment, says: "And thereupon" (which, if it means any thing, means immediately after the judgment) the appellees filed their petition. The order suspending the judgment, was passed on the 2nd of December 1853, so that the petition or motion to suspend must have been filed before that date. It

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was, in fact, filed immediately after the commissioners had notice, and although the court had adjourned, it was only from day to day, and was open on the 2nd of December for the transaction of business. The petition was certainly filed during the term, which is sufficient; for nothing is better settled than that the court has full power over its own judgments during the entire term at which they are passed, and that the term extends to the first day of the next succeeding term. It is the universal practice, on the first day of each term, to call the preceding term, for the purpose of hearing such motions.

But it is said, the time for making such motions is restricted by a *rule of court*. To this we might say, there is no such rule. We have the appellants' statement of what purports to be a rule, but it does not appear authoritatively by the record that there is any such rule of court as they have quoted. There was such a rule of the old county court, but we are not aware that it has been adopted by the circuit court, and nothing short of a distinct, positive, formally adopted rule, can, we think, deprive the court of power over its judgments during the entire term. But ours was not a motion in arrest of judgment, and the rule relied on has no application to it. A motion in arrest of judgment is in the nature of a general demurrer, and is applicable *only to intrinsic defects* apparent upon the face of the record. It is a motion that *no judgment be entered*. *Evans' Practice*, 331. *2 Tidd's Practice*, 948. But here we admit the regularity and correctness of the whole proceeding up to the judgment, and only asked the suspension and modification of it. The motion was based upon matter *extrinsic*. The allegation of the petition is, that an imposition had been practised upon the court, a *suppressio veri* as to the true condition of the slave, which materially affected his valuation, and we have a judicial decision that the judge was not apprised of his diseased condition; for, upon this ground, the court suspended the judgment and directed a new inquiry, with a view to its modification. The motion to correct such a mistake, is certainly not what is technically called a *motion in arrest*. The act of 1787, ch. 9, sec. 6, provides, that where a judgment shall be set aside for fraud, surprise, or irregularity

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in obtaining the same, the court may direct the continuances to be entered. This act contemplates such motions being made not only during the term at which the judgment was entered, but at subsequent terms. And, in the case of *State, use of Sadler, vs. Cox*, 2 H. & G., 379, we find that the judgment was rendered in September 1821, and at April 1825, a motion was made, and prevailed, to strike out the judgment, and, upon appeal, it was not doubted that the court had power to do so. Upon this point we also refer to the case of *Harris vs. Jaffray*, 3 H. & J., 543, where a verdict was rendered for more than was claimed in the *mar*, and judgment was entered for the amount of the verdict. It was held, that at any time during the term, the plaintiff might remit the excess, and the court, on motion, strike out and amend the judgment.

But the appellants insist that the valuation can only be made by the judge before whom the case was tried. By reference to the act of 1809, ch. 138, sec. 21, it will be seen that the power is not given to the *judge*, individually, but to the *court*; the valuation is the act and judgment of the court, whatever judge may happen to occupy the bench. If Judge Constable had died after verdict in this case, or after sentence, and before valuation, would it be contended that his successor was without authority, and that no valuation or payment to the owner could in such case be made? The appellants also contend that too much time elapsed before our motion to reconsider the judgment and valuation was finally acted on. The continuance of the case from term to term, may have been by the appellants' own fault, for aught that appears upon the record. But the motion being filed in time, the subsequent delay is certainly no ground for reversal on appeal.

Nor have the appellants been injured by the delay. They were enabled to present a much stronger case after the negro's feet were healed, and have secured a valuation of \$400, whereas \$50 is quite as much as he could have been valued at in the first instance, by any judge having full knowledge of his then condition, as shown by the affidavits on the part of the appellees. But it is unnecessary to discuss the question whether the final valuation, from which the appeal was taken, is too high

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or too low. It is the act of the court, to which the authority is given by the act of Assembly, and cannot be reviewed upon appeal any more than an allowance of commissions by the Orphans court, to which the sole power is given of fixing the per centage. So a jury may correct and modify their verdict at any time while it is under their control, and it is frequently sent back to them for correction, but the *amount* is not an open question upon appeal.

Again, the appellants contend that the county commissioners had no right to make their motion, because not parties to the case. The same argument would deny to the *appellants* the right of appeal, for neither are they formal parties to the indictment. But there is no force in this objection. The valuation of the slave was in the nature of a judgment against the commissioners; it bound them to pay a certain sum of money, and it would be strange if they had not the right, and sufficient time also, to interpose objection. And here it may be remarked, that even if this were technically a motion in arrest of judgment, the rule limiting the time for such motions would only apply to parties to the verdict. The trial was between the State and the negro, but the judgment of valuation concerned the commissioners and the owners only.

ECCLESTON, J., delivered the opinion of this court.

On the 23rd of November 1853, in the circuit court for Harford county, George Brown, the slave of the appellants, was tried upon an indictment for larceny, and found guilty. The same day the judge of the court (the Hon. Albert Constable) passed judgment upon the verdict, directing that the criminal should be sold as a slave for life, by the sheriff of the county, to some person who should convey him beyond the limits of this State; and the judge also valued and appraised the negro, George Brown, at the sum of six hundred dollars, which it was adjudged and determined should be assessed and levied upon the taxable property of Harford county, by the commissioners of said county, to and for the use of the present appellants; and that if the negro should sell for more than \$600, then the excess thereof should be assessed and levied in addi-

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tion thereto by the said commissioners, to and for the use of his owners aforesaid.

On the 2nd of December following, the commissioners for the county filed a petition, alleging that the valuation of the negro was excessive, and that the same must have been made in consequence of misinformation, or from want of proper knowledge in regard to his diseased and crippled condition, and praying that the judgment of the court might be suspended and reconsidered. With this petition was filed an affidavit of Dr. E. H. Richardson, stating the crippled condition of the negro, and the diseased state of his feet.

The record then proceeds thus: "Whereupon the court here passed the following order, to wit: *Order of court*, December 2nd, 1853. On considering the matter of the within petition, it is ordered, that the sheriff of Harford county suspend the execution of the judgment, and retain the said negro prisoner until the hearing of this application, and the further order of the court; and it is further ordered, that the same stand for hearing on the 4th day of January next, with liberty to the owner or owners of said negro, and the commissioners of the county, to take testimony before any justice of the peace of Harford county, on five days' notice, to be used at the said hearing, and that a copy of this order be served on the owners of the said negro, or their counsel, on or before the 15th instant.

ALBERT CONSTABLE."

Under this order affidavits were taken and filed on both sides. The counsel for the owners filed a motion to dismiss the petition, assigning various reasons therefor.

On the 29th of November 1855, Judge Price (the successor of Judge Constable) ordered and adjudged that the said negro should be sold to some person who would carry him out of this State, and that the sale should be made by the sheriff of the county. And the order goes on to say: "And the court, upon proof and personal visit and examination of said negro, values said negro, George Brown, at the sum of \$400, to be paid to the owners of said negro; and the court further directs, that if said negro produces, on sale, more than \$400, that the excess over \$400, which said negro may produce on such sale, be

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paid to his owners, in addition to said \$400. And it is further ordered and adjudged, that so much of the order passed by this court at November term 1853, as is inconsistent with this order, be and the same is hereby rescinded."

The negro was sold, on the 29th of January 1856, for \$250; and on the 25th of April following, the counsel for the present appellants filed the following directions for an appeal:

"The owners of negro George, by their counsel, direct the clerk to enter an appeal from the judgment at November term, setting aside former valuation," &c.

If the language used, in directing this appeal to be entered, can be considered as intended to include the action of the court in reference to the sentence, as well as the valuation of the negro, still the proceedings in relation to the *sentence* are not properly before us for revision. The State and the negro were the only parties who could ask this tribunal to review the action of the court below in relation to the sentence. The owners have no such right. When a convicted slave is sentenced, if the court should neglect to ascertain his value, the owners would have the right to apply for a prompt valuation; as the act of 1809, ch. 138, sec. 21, requires the court, immediately after conviction, to value the slave. And should such an application be refused, the owners would be entitled to an appeal. The amount of the valuation, however, is a matter within the discretion of the court in which the case is tried, and, therefore, is not subject to revision by an appellate tribunal.

Conceding, then, that in reference to the valuation of a convicted slave, (except it be as to the amount thereof,) if the court commits an error, the owners may appeal, it becomes necessary to ascertain whether any such error is to be found in the case before us. There certainly was no delay in the first action of the court on this subject. The verdict, the sentence and the valuation all occurred the same day.

The appellants, however, among other grounds of alleged error, insist that the application to have the judgment suspended and reconsidered, was filed too late, and the order of the court passed thereupon was erroneous; and, therefore, the petition of the appellees should have been dismissed upon the

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motion of the appellants. The first reason assigned in support of this view, is based upon and sets out an alleged rule of the court in regard to a motion in arrest of judgment, or for a new trial. Now if there was proof of the rule, and the analogy between the application under this petition and either of the motions mentioned in the rule, as stated, was so striking as to render it proper to require that the petition should have been filed within the time limited by the rule, although this might be conceded as true, still it could be of no avail to the appellants. There is no proof in the record of the existence of such a rule. It nowhere appears except in the first reason assigned by the appellants in support of their motion to dismiss the petition.

It has been long settled, as a general rule, that during the entire term in which a judgment is rendered in a court of record, the judgment is under the control of the court, and liable to be stricken out, altered, or amended, unless such general authority is limited or restricted by some positive rule. There is no *proof* of any such limitation or restriction in regard to the case before us.

We have seen that, on the 23rd of November 1853, the court passed sentence upon the negro, and put the valuation upon him. On the 2nd of the following month, the petition of the appellees was filed. And the act of Assembly regulating the terms of the circuit court for Harford county, shows that the judgment of the court and the filing of the petition were during the same term. The application to obtain a correction of the valuation was, therefore, not too late, as insisted upon by the appellants, but was filed in proper time, nothing to the contrary being proved in the record. Moreover, the order suspending the execution of the judgment, must be understood, according to the language of the record, as having been passed whilst the court was actually in session. The statement in the record is: "Whereupon the court here passed the following order, to wit: *Order of court*, December 2nd, 1853," &c.

The appellants deny that Judge Constable had any authority to revise or reconsider the valuation, or to pass any order for such a purpose, on the 2nd of December 1853; and they say,

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admitting *he* then had the authority, still no successor of his, as judge, could in any manner change or modify the first valuation. But we cannot yield our assent to this view of the subject. On the contrary, we think Judge Price could exercise the same authority over the case which would have been possessed by his predecessor, if he had been living, and still in office.

The right of the commissioners to file their petition has been resisted, because they were not "parties to the suit;" meaning, of course, the prosecution against the negro. If this is a good reason why the appellees could not make their application, it must be an equally valid objection to the right of appeal on the part of the owners. They were no more parties to the prosecution than the commissioners. But, inasmuch as the valuation was to be assessed and levied upon the taxable property of the county, by the commissioners, they surely had the right, upon the grounds stated in their petition, to apply to the court for a reconsideration or revision of its valuation.

The record shows that the negro was presented, indicted, arrested, tried, found guilty, sentenced and valued on the 23rd of November 1853. Nine days thereafter, the appellees filed their petition. Under these circumstances, and in the absence of proof of any express rule of court limiting a shorter period of time than nine days for the filing of such an application, the one before us cannot be regarded as coming in too late, or after an unreasonable delay.

The order of the 2nd of December 1853, suspended the execution of the judgment, and directed the sheriff to retain the negro until the hearing of the application, and the further order of the court. We see no good reason why the sentence should have been suspended and the negro retained, instead of being sold. This was not imperatively necessary, for the purpose of revising or reconsidering the valuation. But supposing the court committed an error in thus ordering the sentence to be suspended, it is not such an error as can be revised on this appeal by the owners, as will appear from what has been previously said.

It has been contended that the valuation by Judge Price is

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erroneous, and should be reversed, because it was not made until two years after the sentence, and the act of Assembly required it to be made immediately. It is true the act provides for a prompt valuation, and it is certainly a reasonable and proper provision, one which the court should fully comply with. But surely the Legislature never designed that when the valuation is made in a case like the present, it should be held so final and conclusive as to shut out, entirely, all inquiry as to whether it was correctly or erroneously made. Nor do we suppose the act intended that an application for a reconsideration, in such a case, should not be governed by the general principle or rule which gives to a court of record control over its judgments during the terms in which they are rendered. The appellants complain of the great delay resulting from the order of suspension for revision.\* It will be seen that order authorized depositions to be taken on both sides. We find nothing in the record, since the date of the order, which shows that the delay spoken of resulted more from the proceedings on the part of the appellees than from those of the appellants. Several of the depositions filed by the former are dated in December 1853, and none later than December of the following year. The first filed by the latter is dated in June 1854, and six or seven are dated the 27th of November 1855, only two days prior to the final order, from which this appeal is taken.

Considering that the application was not made too late; that under the order of the 2nd of December 1853, Judge Price had the same authority to act as Judge Constable had; that the amount of the valuation is not a subject for revision in this court; and that the action of the court in relation to the *sentence* is not before us on this appeal, the order or judgment appealed from will be affirmed; which order, it will be seen, only rescinds so much of the former order, of November 1853, as is inconsistent with the last.

*Order affirmed, with costs to the appellees.*

(Decided June 17th, 1858.)

**Wm. TABLER, of Lewis, vs. JOHN A. CASTLE.**

A creditor's bill was filed against a devisee for the sale of the real estate of the testator, to pay debts. The defendant, having been duly summoned, failed to appear, and an interlocutory decree was obtained against him, proof taken, and *final decree* for a sale duly passed. During the *same term* the defendant filed a *petition* asking that this decree might be opened, and his answer let in, alleging that there was some defect in the service of the summons, and the decree passed in consequence of some mistake and surprise, and that the *claim* of the complainant had been *fully paid and settled* by the testator, in his life time. The deputy sheriff made affidavit that he read the summons to the defendant, distinctly informed him of its contents and object, and that defendant replied thereto, "I will attend to it," or "will see about it." But it was proved that the bill was filed upon the *same cause of action* (a single bill) on which the complainant, *six years before the testator's death*, had instituted a suit at law, which suit was entered on the docket "*settled*," and the cause of action, some months *after the testator's death*, was, at the instance of the complainant, withdrawn and delivered to him by the clerk, under an order of the court, but why or for what purpose, does not appear. HELD:

That in view of the affidavit of the deputy sheriff, the decree ought not to be opened upon the allegations of defect in the service of the summons, and of mistake or surprise, but in view of the entry "*settled*," and the circumstances under which the cause of action was withdrawn, the defendant is entitled to relief, such facts tending strongly to show there was misapprehension on his part, which prevented his appearance and answer, and that such failure was not the result of wilful negligence, or intentional disobedience to the command of the summons.

According to the chancery practice of this State, a decree is not considered as *enrolled* until the end of the term in which it has been passed.

**APPEAL from the Equity Side of the Circuit Court for Frederick county.**

This appeal was taken from an order of the court below, (NELSON, J.,) dismissing two petitions filed by the appellant, for the purpose of having the decree which had been passed against him in the case opened, and his answer to the bill let in. The proceedings, and all the facts of the case, are fully stated in the opinion of this court.

'The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

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*Jos. M. Palmer* for the appellant:

1st. Under all the facts and circumstances of this case, the decree passed on the 20th of August 1855, ought to be opened and annulled. It is, without doubt, a well settled principle, both of courts of law and equity, that judgments or decrees obtained by mistake or surprise, will be opened at any time *during the term* in which they are obtained, upon affidavits, and the party let in to try the case upon the merits, if it shall appear to the court that the party so surprised has been injured, and has a good defence upon the merits. Why should it not be so? It would seem to be consistent with all the well settled principles of equity, that where a defendant has omitted to appear to a bill and file his answer, according to the rules of the court, through a misunderstanding and ignorance of the true facts, which make it his duty to appear and answer, and a decree by default has been obtained against him, that such a decree, under such circumstances, should be opened and set aside, to enable him to appear and try his case upon its merits. It would be difficult to imagine a stronger case than the one under consideration. The defendant shows, by his affidavit, that he does not owe the money claimed; that the debt had been "*settled*" in court in 1846; that the single bill in question was given by mistake, and is not due and owing to the complainant; and that he is able and ready to prove that the claim is unjust, and that he does not owe the money. The application to open the decree was made during the July term of the court, while it was in actual session, and the same term in which the decree was passed. The decree was not enrolled; for, in this State, a decree is not considered as enrolled until the term has passed, and until then the court has the absolute control over it, and can alter and change it in any way, so as to promote the ends of justice. If the court had not this power, it would cease to be a court of equity. In the case of *Oliver vs. Palmer & Hamilton*, 11 G. & J., 149, it is said that the act of 1820, ch. 161, "did not design to give one party advantage over the other, and in all cases to make the decree *conclusive* in the cause, although his failure to appear was not the result of negligence, or where it might have proceeded from a provi-

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dential cause; whenever the defendant shall be enabled to present such a case, he would have a right to be let in, to develope the merits of his case, and a refusal of the court below to permit him to do so, would, in our opinion, be error." In the case of *Burch vs. Scott*, 1 *Bland*, 120, the chancellor says: "It has been the long established usage and law of the court of chancery, to consider all its orders and decrees as completely within its control, and open to be altered, revised or revoked during the whole term at which they are passed, on motion or by petition." Many other authorities might be cited to sustain the same general principle. In this case it fully appears by the affidavit of the appellant that he has merits, and that the decree was obtained by surprise; and if the court be satisfied of that fact, the decree will be stricken out, and the party let in to try the cause upon the merits. No injury could result from such a course, but it would be promotive of justice, and prevent absolute injury and, perhaps, ruin to the defendant.

2nd. The short copy of the judgment of Castle against the executor of Peter Tabler, deceased, exhibited in this case by Castle, can have no influence upon the court, in the determination of the questions involved in the cause. 1st. The short copy of the judgment is not evidence, being excepted to, and ought to be considered as out of the record. 2nd. It is a well settled principle of law, in this State, that a judgment obtained against an executor, does not bind the real estate of the deceased, and is not even *prima facie* evidence against the heir or devisee in any case. 4 *H. & J.*, 270, *Duvall vs. Green*. 3 *G. & J.*, 259, *Gaither vs. Welch*. 6 *G. & J.*, 4, *Collinson vs. Owens*. The judgment which was entered up against the executor, was considered as a mere matter of form. It was only for assets *quando acciderint*, and the full record of the case would have exhibited the fact that the defendant pleaded *nil assets ultra*.

*Wm. P. Maulsby* for the appellee:

The decree in this case was obtained in strict accordance with the provisions of the act of 1820, ch. 161, and with the

rules of the court which passed it. The proof is full and clear. The proceedings, so far from being indecently *hurried*, were marked by leisurely deliberation, and are not subject to any of the animadversions of the court in 11 G. & J., 440. The action of the court on the petition of the appellant to open the decree, was to be regulated by a sound discretion, to be exercised according to law, and is subject to revisal by the appellate court. 1 G. & J., 393, *Burch vs. Scott*. 11 G. & J., 147, *Oliver vs. Palmer & Hamilton*. But the true question is, was good cause addressed to the sound, legal discretion of the court, for vacating this decree, and letting in the appellant to answer and make defence, as if he had appeared before final decree? The cause alleged is, that the decree was obtained by surprise and mistake, and that the appellant had, and could have shown, a good defence on the merits, if he had appeared and answered before decree, and his prayer for leave to take proof, is not to show surprise, mistake or fraud, but to show that he had a good defence on the merits; that is to say, he seeks in this indirect mode to get into the record the same proof, and none other, which he might have offered (if he had it) if he had appeared and answered before decree, for the purpose of "*fortifying and strengthening his affidavit as to the surprise and mistake.*" The only mistake and surprise alleged, are in regard to the service of the *subpœna*, and on this point he is careful not even to allege that it was not served, but only that if it was, he did not understand it. The act of 1820, provides no remedy for a party who does not understand a *subpœna*, especially where it is distinctly read to him, and he is informed of the contents and object of it, and replies, "Very well, I will attend to it," as is shown by the affidavit of the deputy sheriff to have been the case in this instance. In none of the proceedings is there an allegation by the appellant that the *subpœna* was not served, or a prayer for leave to take testimony to prove that it was not served. It is not contended that a case might not be presented in which, under the act of 1820, a defendant might not be let in to appear and answer, even after decree, as where it appeared clearly to the court that his failure to appear and answer before decree, was not

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the result of negligence, or proceeded from a providential cause. 11 G. & J., 149. But it is contended that this is not such a case; that in this case, instead of its being shown by the appellant that his failure did not result from negligence, or did result from a providential cause, or any cause addressing itself to the sound discretion of the court, it is shown by the record that, upon the best construction, the failure to appear and answer did result from negligence, upon the most probable construction, that it resulted from the settled purpose of the appellant to thwart and delay the appellee in realizing his just claim, evidenced by the highest form of security, a single bill.

If the appellant had designed to seek to vacate the decree for fraud, as for collusion between the sheriff, appellee, or others, in reference to the service of the *subpoena*, or for other fraud, of whatever character, the remedy would have been by bill of review. 11 G. & J., 148. When the question arises as to the sufficiency of the cause shown for vacating the decree, and letting in the defendant to answer and defend, it is submitted that the unsupported affidavit of the defendant, that the decree was obtained by surprise and mistake, when the nature of the surprise and mistake is not disclosed, and when, if disclosed at all, it appears to consist in an unaccountable ignorance of the commonest duties of a citizen, is not sufficient cause to induce the sound discretion of the court to strike out a decree. If it were, it is submitted that it would amount to a practical nullification of the act of 1820, in favor of defendants of easy conscience.

ECCLESTON, J., delivered the opinion of this court.

The bill in this case was filed in the circuit court for Frederick county, on the 30th of January 1854, by John A. Castle, (the appellee,) against William Tabler, of Lewis, (the appellant.) It is, in form, a creditor's bill; and states that Peter Tabler, late of Frederick county, in his life time, was indebted to the complainant in the sum of eight hundred and forty-three dollars and thirteen cents, and interest thereon, in virtue of a single bill, bearing date the 1st of March 1843, which is filed,

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and marked exhibit No. 1. The bill also states that the said Peter Tabler was seized and possessed of considerable real estate, and, on the 16th of March 1850, made and executed his last will and testament, and thereby devised all his estate, real and personal, after the payment of his debts, to William Tabler, of Lewis, of Frederick county, and thereby constituted the said William Tabler, of Lewis, his executor. That on or about the 10th day of April 1852, the said Peter Tabler departed this life, leaving his said last will and testament unaltered and unrevoked, and, on the 27th of April 1852, the same was duly admitted to probate in the Orphans court of Frederick county, and letters testamentary thereon, were granted to the said William Tabler, of Lewis, who possessed himself of the personal estate of the testator, left at the time of his decease, which personal estate was very inconsiderable, and wholly insufficient to pay the debts due by Peter Tabler, at the time of his decease. And the bill prays that the real estate of the said testator, or so much thereof as may be necessary for the payment of the complainant's claim, and the claims of other unsatisfied creditors, may be sold; and for such further and other relief as may be equitable.

A summons was issued, returnable on the 2nd Monday of February 1854, and the defendant was then returned summoned.

The defendant having failed to appear, the court passed an interlocutory decree, on the 28th of August 1854, ordering a commission to issue, to take testimony to support the allegations of the bill. The commission was issued the same day, but not having been executed as late as the 16th of February 1855, the court revoked that commission and ordered another; which, being issued on that day, was subsequently executed, and the commissioner returned the same on the 19th of February 1855. The defendant not having appeared, on the 20th of August 1855, the court passed a decree for the sale of the real estate which belonged to Peter Tabler, in his life time, in the bill and proceedings mentioned, or so much thereof as might be necessary, for the payment of the debt due to the complainant mentioned in the bill and proceedings, and interest

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thereon, and for payment of other creditors of said Peter Tabler, and costs of the proceedings.

During the term in which this decree was passed, William Tabler (of Lewis) filed a petition, stating that the decree was obtained by some mistake and surprise, which was not discovered until a few days previous to the filing of the petition; that the first notice he had in any way of the decree, and of the proceedings upon which it was passed, was by an advertisement of the sale of the real estate in question, by the trustee appointed in the case. The petitioner states positively that there has been some mistake in the supposed service of the summons issued in the case, but how that mistake originated, he is unable to state; but he does state positively that if said summons was ever mentioned to him, he utterly misunderstood that matter, for if he had understood that he had been summoned to appear and answer the bill of complaint of John A. Castle, for any case, he should, without delay, have applied to his counsel to appear to the case and defend the same, as the pretended claim of John A. Castle, which he seeks to enforce, is not justly due and owing to him, but the same has been fully settled and satisfied. That the failure of the petitioner to appear in court, according to the summons, was attributable to the mistake in relation to the service thereof, and not with an intention to delay the complainant in the prosecution of his suit. That the petitioner does not intend to deny that the deputy of the sheriff may have spoken to him, at some place in the county, in relation to said summons, but if he did, the petitioner did not understand its purport, and by reason of said mistake and the obtaining said decree, he has been taken by surprise, and greatly injured by the decree.

The petitioner also states he is advised that he has a good and competent defence to the pretended claim of Castle, if he can be permitted to appear to the case and file his answer, setting forth facts in defence.

It is further stated, in the petition, that Peter Tabler, at the time of his death, did not owe to Castle the sum of money, or any part thereof, specified in the said single bill filed with the bill of complaint, but that the same had been settled and satis-

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fied during the life of Peter Tabler, as fully appears by the disposition of an action instituted in Frederick county court, as a court of law, on the same cause of action, in which John A. Castle was plaintiff, and Peter Tabler defendant, which stood for trial on the docket of said court at the February term of the court, and on the 3rd day of March 1846, during said term, that case was entered *settled*. That the note or single bill on which said suit was instituted, being the same note or single bill now in dispute, remained on file in the clerk's office, in the said case or action, until after the death of Peter Tabler, and until the 5th day of August 1852, when the same note or single bill was taken from the files of the said case, under and by virtue of an order of the judge of the court, without stating the cause for which it was wanted. All which, the petition states "fully appears from an extract of said case, the entry settled, the order of the Hon. M. Nelson, of the 5th of August 1852, and a copy of said note or single bill, &c., under the seal of the clerk of the circuit court for Frederick county, here exhibited, marked A, to this petition, which your petitioner prays may be taken and considered as a part of this petition.

The petitioner further states, he is advised that if, under the circumstances, the decree of the 20th of August 1854, is permitted to stand unrescinded, and the enrollment unopened, by the tenor and effect of said decree, the complainant therein has established the right to the receipt and collection of the whole amount of the eight hundred and forty-three dollars and thirteen cents, specified in said note or single bill, and the interest thereon, when, in truth and in fact, not one cent is due, and when the decree was obtained by mistake, and when the said John A. Castle, on the 5th of August 1852, admitted, by his affidavit on the back of said note, that the whole sum specified in the note was not all due, but that certain credits, the amount of which was not known, ought to be allowed.

It is also stated by the petitioner, that he has fully paid all the debts and claims which have been presented to him in due form of law, due and owing by the said Peter Tabler, at the time of his death, and the petitioner verily believes that no

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person has any claim against him, as executor of said Peter Tabler, except the pretended claim of John A. Castle, and if there be any just claim not paid, the petitioner says he is ready and willing to pay said claim or claims whenever they shall be presented, properly authenticated.

The petition prays the court to order and direct "that the enrollment and decree in this case, passed on the 20th day of August 1855, be opened, and the said decree vacated, and the said defendant let in to answer said bill upon equitable terms, unless good cause to the contrary be shown; and that the court will order and direct the trustee appointed by the decree, to surcease from all further proceedings in the case as trustee, until the further order of the court in the premises." There is also a prayer for general relief.

The petition was sworn to and filed on the 4th of October 1855, and on the same day the court passed an order requiring John A. Castle, by his solicitor, to appear before the court on the 10th of the same month, and show cause why the enrollment and decree should not be opened and the decree vacated, as prayed; and further requiring the trustee in the case to surcease from all further proceedings as such trustee, until the further order of the court.

A few days after the passage of this order, John A. Castle, by his solicitor, filed his answer. He says it is not true, as stated in the petition, that the decree of the 20th of August 1855, was obtained by mistake or surprise on said petitioner. The respondent also states that the bill of complaint in said cause was filed on the 30th of January 1854, that the summons was issued the same day, and delivered to the sheriff, and on or before the 4th day of the ensuing month, it was served upon the petitioner, William Tabler, of Lewis, by Joseph M. Ebberts, a duly qualified deputy of the sheriff, by distinctly reading the summons to the said petitioner, and thereby informing him of the contents, and object, and command thereof, as will appear from an affidavit of the said deputy sheriff, herewith filed, and marked exhibit A.

The respondent further states, that the interlocutory decree in the said cause was not applied for and obtained until the

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26th of August 1854, and that a final decree was not applied for and obtained until the 20th of August 1855, so that the petitioner had about eighteen months given him, within which to appear to the bill and file his answer, if he desired to do so, and therefore this respondent cannot be justly charged with an attempt to surprise the petitioner, as a final decree was not obtained with anything like the expedition which the rules of law and of the court would have warranted.

The answer denies that Peter Tabler, in his life time, paid to the respondent, or to any one for his use, "the sum of money mentioned in said single bill filed with said bill of complaint, or any part thereof, or that the same was settled and satisfied in any manner whatsoever, and he states that at the death of Peter Tabler, the same was due to this respondent." He further states, that since the death of Peter Tabler, this respondent instituted an action at law in the circuit court for Frederick county, on said single bill, against the said petitioner, who is the executor of Peter Tabler, and also devisee under his will, and on the 22nd of February 1854, the respondent obtained judgment in said court for the full amount of the principal and interest of said single bill, as will appear from a copy of said judgment herewith filed, marked exhibit B.

In his answer the respondent further states, that the entry in a suit of which exhibit A, filed with said petition, is a copy, was not made or intended as an entry, that said single bill had been settled or satisfied, but was made alone by way of withdrawing said single bill from suit at that time, which this respondent was induced to consent to by the earnest importunity of the said Peter Tabler, who was his uncle, and who promised that said single bill should be paid within a short time thereafter, "all which this respondent was ready to prove at the trial of said cause, in which the said judgment was obtained, on the 22nd day of February 1854."

This answer was sworn to on the 6th of October 1855; and the affidavit of Joseph M. Ebberts, filed with the answer as exhibit A, is dated the same day, in which it appears that the affiant was a deputy sheriff on the 30th of January 1854, and so continued to be until his affidavit was taken; that the sum-

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mons referred to in the petition and answer thereto, was, on or about the 30th of January 1854, regularly delivered to the affiant, and he says, that between that day and the 4th day of February then next ensuing, he served the said summons on the said William Tabler, of Lewis, "by reading the same to the said William Tabler, of Lewis, and by distinctly informing him of the contents and object of said subpoena, and that to the best of his recollection and belief, the said William Tabler, of Lewis, remarked, in reply to the explanation by this affiant of the contents and object of said subpoena, 'Very well, I will attend to it,' or, 'I will see about it,' which form of expression was used this affiant does not clearly recollect."

The exhibit B, filed with the answer of Castle to the petition, is a short copy of the judgment of the 22nd of February 1854, referred to in the answer; and the short copy shows the judgment was obtained against William Tabler, of Lewis, as executor of Peter Tabler, and to bind assets *quando acciderint*.

To the admissibility of this exhibit as evidence, exceptions have been filed by the petitioner, upon the ground that such a judgment is not evidence in this controversy relating to a decree for the sale of the real estate formerly owned by Peter Tabler, and devised by him to the appellant.

The parties filed the following agreement:

"John A. Castle vs. William Tabler, of Lewis. No. 2539. Equity. In the circuit court for Frederick county, sitting as a court of equity. We, the solicitors for complainant and defendant, agree that the short copy of the within case or action at law, No. 37 trials, Frederick county court, of the February term 1846, shall be taken and considered the same, and to have the same effect as if a full record of said case was made and exhibited under the seal of said circuit court, certified," &c.

This agreement relates to the exhibit referred to in the petition, and therewith filed, marked exhibit A; which exhibit shows the entry of *settled*, on the 3rd of March 1846, in the action at law instituted by John A. Castle vs. Peter Tabler, in Frederick county court, upon the said single bill for \$843.13, also the order of the court in the same case, dated the 5th of

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August 1852, directing the clerk to deliver the note to the plaintiff, retaining a copy of the same; which exhibit A, also shows a copy of the note or single bill retained by the clerk, which copy is as follows:

"\$843.13. Twelve months after date, I promise to pay John A. Castle, or order, eight hundred and forty-three dollars and thirteen cents, for value of him received, with interest from date. Witness my hand and seal, this first day of March, one thousand eight hundred and forty-three.

Witness—*S. R. Waters.* PETER TABLER, (Seal.)"

A replication was filed by the petitioner, but no commission to take testimony was issued.

On the 13th of October 1855, the petitioner filed a further petition, reciting some of the previous proceedings, and praying that a commission might be issued to take testimony to prove the allegations in his petition, to show that he has a good and complete defence to said bill upon the merits, or to authorize the petitioner to take affidavits before a justice of the peace, to be filed, to strengthen and fortify his affidavit as to the mistake and surprise in obtaining the said decree, and that he might be allowed to prove all such facts and circumstances as would tend to show that the decree of the 20th of August 1855, was obtained by some mistake or surprise.

Without ordering proof to be taken in either of the modes asked for by the petitioner, the court passed an order, on the 3rd of March 1857, dismissing both of the petitions filed by William Tabler, of Lewis. From this order he appealed.

It will be seen that the petition seeking to have the decree opened, was filed during the same term in which it was passed. Although such is the fact, with the affidavit of the deputy sheriff before us, in regard to the service of the summons, we should not deem it proper to open the decree simply upon the allegations set forth in the petition, in reference to some defect in the service of the summons, and that the decree was passed in consequence of some mistake or surprise. But, in our opinion, there is evidence tending strongly to show there was misapprehension on the part of the petitioner, which prevented him from appearing and filing an answer to the bill of com-

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plaint; and that his failure to appear and answer was not the result of wilful negligence, or intentional disobedience to the command of the process.

The bill of complaint was filed upon the same single bill on which a suit at law had been instituted in Frederick county court, by John A. Castle, against Peter Tabler, which suit was entered "settled" on the 3rd of March 1846. The defendant in that suit was then living. According to the statement in the bill, he died on or about the 10th of April 1852, which statement is corroborated by a witness examined on the 19th of February 1855, under the commission, who then thought the death was about three years before.

For six years, during Peter Tabler's life, after the action at law had been entered *settled*, the single bill remained on file in that case; and not until some months after his decease was it withdrawn; when, at the instance of Castle, it was delivered to him by the clerk, under an order of the court. Why or for what purpose it was ordered to be delivered, is not disclosed by any thing appearing in that case.

In view of the entry "settled," and the circumstances under which the cause of action was withdrawn, we think the appellant is entitled to relief. And we think so, even conceding (without, however, so deciding) that the judgment stated in the appellee's exhibit B, is admissible as evidence. It was only a judgment to bind future assets; and, inasmuch as the administration account previously passed by the Orphans court, showed that the executor had overpaid the personal estate upwards of \$600, the aggregate amount of that estate being only \$225, it might readily be supposed there was very little, if any, prospect that the executor would ever have any future personal assets, which he would be required to apply to Castle's judgment. This being so, with a view of avoiding the expense and trouble of a contested trial at law, the executor might have consented to give a judgment to bind assets *quando acciderint*, without designing to acknowledge, or supposing he was thereby confessing, and, in fact, without believing, that the claim had not been fully settled, according to the entry, in the former suit.

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Entertaining these views, it becomes unnecessary to decide whether the appellant's exceptions to the admissibility of the evidence should or should not be sustained.

Each party shall pay his own costs in this court, in any event. And before the decree shall be opened, the appellant shall pay to the appellee, or to his solicitor, or deposit in the court below, to be paid to the appellee, all his costs which accrued in the said court before the filing of the appellant's first petition; the said costs to be taxed by the clerk of that court. And if such costs in the court below shall not be paid as above directed, before or within the first four days of the first October term after this cause shall be transmitted or sent down by the clerk of this court to the court below, the said decree shall stand unaffected by any proceedings under the present appeal.

In the event of such payment of costs as will authorize the decree to be opened, then all the costs, from and after the filing of the appellant's first petition, which have accrued or may accrue in the court below, are to await the final result, or such future order or decree as may be passed in relation thereto.

Although the first petition of the appellant was filed during the same term at which the decree was passed, still the petition asks to have the enrollment opened, and other proceedings speak of, or refer to, the enrollment of the decree. It may, therefore, be proper to remark, that according to the chancery practice in this State, a decree is not considered as enrolled until the end of the term in which it has been passed.

*Order reversed and cause remanded  
for further proceedings.*

(Decided June 17th, 1858.)

LE GRAND, C. J., dissented.

I may say in this, as was said by Mr. Justice Thompson, in the case of *Wheaton vs. Peters*, "It is a matter of regret with me, at any time, to dissent from an opinion pronounced by a majority of this court. And when my mind is left balancing, after a full examination of the case, my habitual respect for the opinions of my brethren may justify a surrender of my

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own. But where no such apology is left to rest upon, it becomes a duty to adhere to my own opinion." I can discover no equity whatever in the application of the appellant. The evidence of the deputy sheriff is positive, that he made known to him the nature of the summons, and, if any thing be inferable from his reply to the officer, it must be, that he understood what was expected of him. He not only did not comply with the requisition of the summons, but allowed eighteen months to elapse before final decree, without the slightest action on his part. If this be not disobedience to the court, I know not what constitutes it. I think the decree should stand, and am therefore of opinion the action of the circuit court ought to be affirmed.

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### ISAAC MICHAEL vs. CAROLINE M. BAKER, EXCX. of CATHARINE MICHAEL.

By an *ante-nuptial* agreement, a wife was empowered to dispose of certain real and personal property, by will, and to hold and receive certain funds for her sole and separate use. HELD, that the orphans court were right in admitting her will to probate, as valid to pass real and personal estate, its form and attestation being sufficient, but were not required to decide what extent of property would pass under the will.

The orphans courts are courts of limited jurisdiction: they may take probate of wills disposing of real and personal estate, and where the will of a *married woman* is propounded for probate, the probate does not decide upon the *right of disposal*, but merely upon the *factum* of the instrument.

Where the will of a *married woman* having, by an *ante-nuptial* agreement, power to dispose of property by will, is offered for probate, the orphan's court will not look nicely into the power of the wife; the question whether the will is a sufficient execution of the power belongs to the courts of law and equity, and not to the orphans court.

Where a wife under an *ante-nuptial* agreement, is entitled to receive and hold certain funds to her sole and separate use free from the marital rights of her husband, such funds will pass by her will, though the power of disposing of them may not be expressly conferred upon her by the agreement.

An *ante-nuptial* agreement, giving to the wife power to dispose of certain real and personal property by will, is not a testamentary paper, forms no part of her will and should not be admitted to probate.

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APPEAL from the Orphans Court of Frederick county.

The appellee offered for probate in the court below, the will of Mrs. Catharine Michael, executed on the 26th of April 1856, whereby the testatrix, after some pecuniary legacies, devised and bequeathed "all the rest and residue of her estate, real, personal and mixed, to her daughter Caroline M. Baker, her heirs and assigns forever," and appointed the said Caroline her executrix.

This will was executed and attested in the usual form, to pass real estate, as if the said testatrix was a *feme sole*. She was however at the time of its execution and also at the time of her death the *wife* of the appellant, who filed a *caveat* to the will, insisting that it was utterly void for any purpose, because not executed according to the act of 1842, ch. 293, sec. 6, and the laws of this State; the testatrix being at the time a *married woman*, the wife of the caveator. To this caveat, the executrix filed an answer, insisting that the will was executed according to law, and under an *ante-nuptial agreement* entered into between the testatrix, then Catharine Baker, and Isaac Michael, the caveator, dated the 4th of March 1850.

This *ante-nuptial settlement*, (which was also filed in the court below with the will,) executed by both parties under their hands and seals, recites that a marriage is about to be solemnized between them and they have agreed to enter into the following covenants and stipulations. "First, the said Catharine Baker being possessed *in her own right* of money, *chooses in action*, book accounts and other personal property, to the amount of \$4250, doth hereby transfer, assign and convey the same to the said Isaac Michael, his executors, &c., and the said Isaac Michael, in consideration of the said sum of \$4250, doth covenant and agree with the said Catharine Baker, her executors, &c., to pay to her the said Catharine during her life, notwithstanding her coverture, the annual interest accruing on the said sum of money annually in each and every year, *for her sole, separate and exclusive use and benefit, free from his marital rights*, and in case the said Isaac should die before the said Catharine, he, the said Isaac, doth

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bind his heirs, executors, &c., to pay to the said Catharine, her executors, &c., the said sum of \$4250, with any interest which may be due thereon." It was further stipulated, "that any receipt signed by the said Catharine, during her coverture for the interest, shall be as full and complete a discharge as if she were sole." It was further agreed that the said Catharine, "*shall be at full liberty to devise and bequeath the said sum of \$4250, and any interest which may be due thereon, as if she were a feme sole, and that he the said Isaac will consent to any will or wills, or to any codicil or codicils, which she the said Catharine may make during her coverture with the said Isaac Michael, and that he will assent to the same in writing.*" And in default of any appointment by any will or codicil, he, the said Isaac Michael, binds himself, his heirs, executors, &c., in the event of his surviving the said Catharine, to pay the said sum of money to any child or children which she may leave," equally among all, if more than one, share and share alike. It was also further agreed, "that the said Catharine shall during her coverture, receive the rents and profits of the house and lot situated in Middletown, now owned and occupied by the said Catharine Baker, for her sole, separate and exclusive use;" and the said Isaac further agrees, "that the said Catharine during her coverture, may and shall have power to sell and convey said house, and invest the proceeds in such manner as she may direct, for her sole, separate and exclusive use and benefit," and he covenants to unite with her in any deed which may be necessary to convey title to the same, and agrees "*that the said Catharine may devise the said real estate or any other real estate which she may purchase during coverture, and may bequeath the proceeds of any sale of real estate to any person whom she may appoint,* and in default of appointment, that such real or personal estate shall descend to, and be distributed among, any children which she may leave if more than one, if only one child, that such child shall receive the whole personal estate and real estate, which she the said Catharine may leave." It was further stipulated that this agreement should not "debar the said Catharine Baker, from any right which she may acquire by virtue of her

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intermarriage with the said Isaac Michael, either in the real or personal estate of the said Isaac."

The due execution of this agreement was admitted, and it was also admitted that the marriage took place between the parties thereto in March 1850, and that the paper offered for probate was executed by Mrs. Michael, as it purports, in the presence of three witnesses whose signatures are also admitted.

The case was tried before the orphan's court, and the *ante-nuptial agreement* being offered in evidence by the caveatee, it was objected to as incompetent evidence for any purpose, and inadmissible to prove that the will in question was made with the consent of the caveator, the husband, or in conformity with the act of 1842, ch. 293, sec. 6. This objection however the court overruled and admitted the agreement as evidence. The caveatee also offered in evidence, extracts from the assessment books of Frederick county, under the hand of the clerk of the county commissioners and seal of office, showing that Mrs. Catharine Michael stands charged thereon with "Real estate in the corporation of Middletown: House and lot valued at \$1700; assessed 1853 \$1700. In District private securities \$4250;" also a receipt from the collector of taxes for said county, showing that the State and county taxes for the years 1856 and 1857, on the foregoing property had been paid by said Catharine Michael. The admissibility of these papers was objected to by the caveator, but the objection was overruled by the court.

The court then passed an order admitting the will to probate, "as and for a valid last will and testament of said Catharine Michael, to devise and bequeath the real and personal estate of the said Catharine Michael," and also admitting to probate the said *marriage settlement*, and granting letters testamentary to the caveatee. From this order the caveator appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, and BARTOL, J.

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Michael vs. Baker, Exce<sup>x</sup>. of Michael.

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*Wm. P. Maulsby and Jos. M. Palmer* for the appellant:

1st. The decree appealed from is manifestly erroneous, in admitting to probate the ante-nuptial contract, for the orphans court most certainly had no power or authority to decide as to the validity of this agreement, nor to admit it to probate, as it has not the slightest resemblance to a testamentary instrument, nor does the paper purporting to be a will in any way refer to it as the basis of the will.

2nd. The court also decided and decreed, that the paper purporting to be a will be admitted to probate as a valid last will and testament, to devise and bequeath the real and personal estate of the said Catharine Michael, without deciding upon what principle such judgment was given, or assigning any reasons for their determination. It is admitted that a married woman, in this State, may make a good and valid will of her own property real and personal, provided the will is executed in the manner required by the act of 1842, ch. 293, sec. 6, but this will was not so executed, and is utterly void then so far as the wife's own property independent of the power, is concerned. We shall not stop *here*, to examine the question as to what the rights of *feme coverts* were before the act of 1842, in relation to their separate property, either in England or this country. If the paper in question can be considered a valid will at all, in relation to the real and personal property specified in the power which the wife as a *feme covert* had a right to dispose of by will, it must be because it was made and intended to be made as a last will and testament, in execution of the power. The wife, when she executed this paper, must have done it with an express intention of executing the power by will, and that intent must appear clearly and distinctly from the face of the paper itself, and if that intent does not appear from the paper intended to be a will, the power is not executed. The question to be decided is, whether the wife has properly executed the power of appointment, not whether the husband has been guilty of a violation of his covenants and stipulations in the marriage contract. It is now well settled, that a *general devise*, however unlimited in terms, will not comprehend the subject matter of a power unless it refer to the subject

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matter or to the power. *2 Brown's Ch. Rep.*, 304, *Andrews vs. Emmet*. 4 *Kent*, 334. In the case of wills, it has been repeatedly decided and is now the settled rule, that in respect to the execution of the power, there must be a reference to the subject of it or to the power itself, unless it be in a case in which the will would be inoperative without the aid of the power, and the intention to execute the power becomes clear and manifest. If there be an interest and power existing together, in the same person over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest and not the power. 4 *Kent*, 335. In this case the wife owned and held the fee of the land as well as the power to dispose of it by will. In *Lovell vs. Knight*, 3 *Simons*, 275, the words of the will were: "The whole of my property both real and personal, and whatsoever I may possess at the time of my decease," and the Vice Chancellor says, a will couched in such terms as that upon its face it appears to express an intention to pass the general property which may belong to the party making the will, shall not be deemed an execution of a power with regard to any specific property. The cases of *Jones vs. Tucker*, 2 *Mer.*, 533; *Webb vs. Honnor*, 1 *Jac. & Walk.*, 352; *Nannock vs. Horton*, 7 *Ves.*, 391, and *Buckland vs. Barton*, 2 *H. Bl. Rep.*, 136; all sustain the same general principle. In *Jones vs. Curry*, 1 *Swans.*, 67, the will not only contained no reference to the power nor to the subject matter of it, but was in terms expressly confined to the property of the testatrix, and the master of the rolls decided, that he was bound by the doctrine of the court to consider the will as confined to her own property, and not comprehending that over which she had a power. In the case of *Bradley vs. Westcott*, 13 *Ves.*, 446, the master of the rolls fully sustains the principles established in the case of *Andrews vs. Emmet*, and the other cases cited, and explains that of *Standen vs. Standen*, 2 *Ves. Jr.*, 589. *Best J.*, in *Nowell vs. Roake*, 2 *Bing.*, 497, and 5 *Barn. & Cress.*, 720, uses this strong language: "No terms however comprehensive, although sufficient to pass every species of property, freehold or copyhold, real or personal, will execute a power unless they

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demonstrate that the testator had the power in his contemplation, and intended by his will to execute it." The whole question is one of intent which must be collected from the will itself. Judge Story, in *Blagge vs. Miles*, 1 *Story's Rep.*, 441, and Chancellor Kent, in *Bradish vs. Gibbs*, 3 *Johns. Ch. Rep.*, 535, sustain the same general principle contained in the cases referred to. The paper in this case purporting to be a will, was not executed according to the terms, true intent and meaning of the marriage contract; it does not profess to be an execution of the power but is in direct violation of it; the power provides the form and manner of its execution, and if not executed according to its terms, this paper cannot operate as a will. It is clear, that the intention of the parties was that the power should be executed by a will made as directed by the act of 1842, ch. 293, and if it had been so executed it would have been a valid execution of the power. A party *creating* a power, certainly has the right to fix the terms of its execution. The husband, in this case, never refused to aid and assist his wife in making a will in strict accordance with the power. He never was applied to for that purpose, and if he had been and had refused it, this would not have made the paper in question a valid will. He would perhaps have been guilty of a breach of covenant, for which a court of chancery might have interposed its aid if applied to, but such a question is not now before the court. He covenants that he will permit his wife to make a will, and that he will assent to it in writing, and in the same contract he also covenants to join her in a deed conveying her real estate. Now suppose a deed had been executed by the wife without the husband's joining her as provided by the power, would it have been good? and how can we discriminate such a case from that of executing a will without the assent of the husband as provided by the same power? It is for these reasons submitted that the power is not executed, and therefore that the decree of the court below is erroneous.

3rd. But the appellee's counsel say that the caveator, the surviving husband of the testatrix had no right to file a *caveat* to this paper, upon the ground that he has no right or interest

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is the personal estate of his deceased wife, or of the settlement thereof, having abandoned and released all right and control over it by the marriage contract, and to sustain this position they refer to *Ward vs. Thompson*, 6 G. & J., 349; *Maurer vs. Naill*, 5 Md. Rep., 324, and other cases, as conclusive of this question. We are not able to perceive the analogy between these cases and this. The marriage contract in this case, has not the slightest resemblance to those in the cases referred to. In *Ward vs. Thompson*, the contract was, that all the property of every description, which the intended wife was then entitled to or might thereafter become entitled to, should be and was conveyed to trustees for her use and benefit. No such provision or any thing like it is contained in this contract. The caveror here did not give up the right to any of the property of his intended wife during coverture, except the interest on the \$4250, and the rents of the house and lot in Middletown. The surviving husband is, also, by the act of 1798, ch. 101, sub-ch. 5, sec. 8, the administrator of his deceased wife, without letters, and under the facts and circumstances of this case had an unquestionable right to file the *caveat*. 1 *Phillimore*, 254, *Moss vs. Brander*. 1 *Hoff. Ch. Rep.*, 12, *Heyer vs. Burger*. 7 *Johns. Ch. Rep.*, 229, *Stewart vs. Stewart*.

*Wm. J. Ross and Richard H. Marshall* for the appellees.

1st. The paper offered for probate in this case is a will of a married woman, made in pursuance of a power vested in her by an ante-nuptial contract. To render appointments under such a will available, a *probate* of the will is necessary. 1 *Wms. Execs.*, 42. 3 *Atk.*, 160, *Ross vs. Ever*. 9 *Ves.*, 369, *Rich vs. Cockell*. 2 *Roper on Husband & Wife*, 189. The purpose of the probate is only to confirm judicially the testamentary nature of the paper offered for probate. It can be proved without the consent of the husband, as it is limited to the property embraced in the power. 1 *Sugden on Powers*, 185, sec. 3. 2 *Roper on Husband & Wife*, 189. 1 *Phillimore*, 352, *Tappenden vs. Walsh*. *Ibid.*, 254, *Moss vs. Brander*. The spiritual courts in England are authorised to pro-

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bate mixed wills of real and personal estate, (1 *Wms. Excrs.*, 238,) and in Maryland, the orphans courts are authorised to probate wills of real as well as personal estate, (*act of 1831, ch. 315.*) But the ecclesiastical courts will not look *nicely into the question, whether the appointment is authorised by the power,* as the grant of probate does not determine the question, but leaves that open for the decision of the temporal courts. 1 *Phillimore*, 352. 1 *Curteis*, 286, *Ledgard vs. Garland*. The probate, as is established by all the authorities, settles nothing but the testamentary character of the appointment, so that the appointees may assert their rights under the appointment in the temporal courts. In this case the record contains full proof of the power and of the testamentary character of the paper offered for probate, in execution of the appointments authorised by the power. If these positions are sound, then the order of the orphans court admitting the will to probate is correct, and must be affirmed without any further examination or consideration of the case. But if this view of the case should be regarded as erroneous, and in the judgment of this court it is material to proceed further, with a view of ascertaining whether the appointing power has been duly exercised, then it is insisted:

2nd. That the husband, the caveator, can have no standing in court, which entitles him to interpose a *caveat* to the probate of this paper. The will cannot operate upon any other property than that contained in the power, or that which the wife held to her separate use. 1 *Wms. Excrs.*, 42. 11 *Md. Rep.*, 492, *Cooke vs. Husbands*. By the terms of this power, the wife is authorised to dispose of that property by last will and testament, and in case of her death without a due exercise of her disposing power, the property is limited over to her child or children as the case may be. In no event can the caveator have any interest in the property contained in the power. The wife left a daughter to whom the property passes, in case of a non-execution of the power. The case of *Maurer vs. Naill*, 5 *Md. Rep.*, 324; *Ward vs. Thompson*, 6 *G. & J.*, 34; *Waters vs. Tazewell*, 9 *Md. Rep.*, 291; *Hutchins vs. Hooper*, 11 *Md. Rep.*, 29, and *Rex vs. Bettsworth*, 2 *Strange*, 1111; are conclusive on this point.

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3rd. That the paper offered for probate, is a good and valid execution of the disposing power vested in the wife by the ante-nuptial contract. This power authorises the wife to will and bequeath all the property contained in the power by her last will and testament. The paper offered for probate as her will, is fully proved to have been executed by her as her will, and is in due form of law, to devise and bequeath real and personal property in Maryland. There can be no well founded objection as to the *quo modo* of disposition, for it is strictly in the mode pointed out in the power. The only question then is, did the wife mean to execute the power vested in her by the marriage contract, when she made and executed this paper? Questions of this kind, like all other questions on wills, depend upon intention. If this satisfactorily appears, it is all that is required. It is not necessary that the intention should appear in *express terms* on the face of the instrument, nor that the power should be referred to. The intention to execute the power however manifested, whether directly or indirectly, or by just implication, is sufficient to make it valid. *4 Kent*, 335. *3 Johns. Ch. Rep.*, 551, *Bradish vs. Gibbs*. *1 Story's Rep.*, 426, 446, *Blagge vs. Miles*. *9 Simons*, 443, *Curteis vs. Kenrick*. *16 Eng. Ch. Rep.*, 447, *Churchill vs. Dibben*, (*note.*) In all cases, a will will operate as an appointment under a power, provided it can have no operation without the power. In the case of a married woman having a testamentary power, and making her will, it must be intended to be an exercise of the power, though it contains no reference to it, because the will of a married woman can operate in no other way than as an exercise of her power. See cases already cited on this point, and *1 Sugden on Powers*, 419 to 451, where all the authorities are brought together, and *1 Hoff. Ch. Rep.*, 2, *Heyer vs. Burger*.

4th. The certificate of the clerk of the commissioners of the tax under the seal of that court, is evidence of what the commissioners' books contain, (*1 Greenl. on Ev.*, secs. 493, 484, *et seq.*; *2 Md. Ch. Dec.* 186, *Hughes vs. Jones*; *16 Eng. Ch. Rep.*, 447,) and from this certificate and the receipts of the collector of the tax, it is clear the wife, at the time she exe-

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cuted this paper, had no other property but that contained in the power, and they conclusively show that she meant to execute her power. The residuary clause wills and bequeaths all the rest and residue of her real and personal estate to her daughter. She had no other real property but that contained in the power. She must, as a necessary consequence, have meant to refer, in this clause, to the real estate, and by classing with it all her personal estate in like condition, she clearly shows what personal property she meant to bequeath. She could have meant no other personal property but that contained in the power, and in the same condition of the real estate which she clearly devised. In any view of the case, her will could only operate as an execution of her power, and her intent to execute it clearly appears.

The order appealed from is admitted to be erroneous, in so far as it admits to probate the marriage contract.

BARTOL, J., delivered the opinion of this court.

The only question presented by this appeal is, whether the paper purporting to be the last will of Catharine Michael, is entitled to be admitted to probate, as a valid disposition or appointment.

At the time of its execution the testatrix was a married woman, and continued so till the time of her death; the will was not made and attested in conformity with the provisions of the act of 1842, ch. 293, and is not entitled to be admitted to probate, unless the same was made in virtue of her rights under the ante-nuptial agreement between her and her husband the caveator.

Many cases have been cited to show the principles, by which courts in England and in this country have been governed, in deciding upon the construction of powers and their execution. We have examined them carefully; but in our view of the case before us, it is not necessary for its determination, to review the various decisions to which our attention has been directed.

The case comes before us on appeal from the orphans court for Frederick county, which is a court of limited jurisdiction. It is authorised under the act of 1831, ch. 315, to take probate of wills disposing of real and personal estate.

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In considering this case, that court must be treated simply as a court of probate.

In *Tappenden vs. Walsh*, 1 *Phillimore*, 352, where the question was on admitting to probate the will of a married woman, it is said, "by the law as it stands at present, a married woman who possesses separate property, may dispose of it without the consent of her husband. The probate of this court does not decide upon the right of disposal, it decides merely on the *factum* of the instrument; perhaps if no probate were granted by this court, the person to whom the property is left might be unable to recover it." And in the same case the learned judge refers to the case of *Bowes vs. Bowes*, decided in 1801, when it was laid down as the law governing the ecclesiastical court in such cases, "that it would not look nicely into the power of the wife, as that right belonged to another court." That rule we consider as applicable to the orphans courts in Maryland; and in reviewing their judgment passed in this case, as an appellate tribunal, it is unnecessary to express any opinion as to the extent to which the powers vested in the testatrix under the agreement, may have been executed by her will. Such questions belong properly to the courts of law and equity, which are vested with ample jurisdiction to hear and determine them.

In this case the ante-nuptial agreement, which was produced before the orphans court, the execution of which was admitted, abundantly showed that Mrs. Michael was empowered to make a will notwithstanding her coverture. Besides it appears from the agreement, that she was entitled to receive and hold absolutely to her sole and separate use, free from the marital rights of her husband, certain funds specified in the agreement. Under her will, such funds would pass, although the power of disposing of them may not be expressly conferred upon her by the agreement. This is the well established doctrine in England, and it is now settled law in Maryland; see *Cooke vs. Husbands*, 11 *Md. Rep.*, 492, and the authorities there cited.

The agreement also shows, that Mrs. Michael had a power to dispose, by will, of certain real estate therein mentioned. Whether the will is a sufficient execution of that power, is not

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a question which the orphans court was called upon to decide. The form and attestation of the will are sufficient to pass such real estate, provided it is to be construed as an execution of the power. Without expressing any opinion on that question, we think the orphans court decided correctly, in admitting the will to probate, as a valid testamentary paper, to pass real and personal estate; but they were not required to decide what extent of property would pass under the will.

The court erred in admitting to probate the articles of agreement, they are not a testamentary paper, and form no part of the will.

In order that the order of the orphans court may be corrected, and made conformable to the opinion of this court, the cause will be remanded.

*Cause remanded.*

(Decided June 22nd, 1858.)

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### W.M. E. SHRINER vs. LEWIS LAMBORN, use of JOSHUA SMITH.

An action was brought on a single bill in the name of the obligee, as *legal plaintiff*, for the *use of his assignee*, as the equitable plaintiff. The declaration was in the usual form of *debt*, the obligee being named therein as plaintiff. The obligor, the defendant, pleaded *payment* "to the said plaintiff," and on this plea issue was joined. HELD:

That the defendant could offer, in support of *this issue*, a receipt showing that he *had paid* the bond to *the obligee*, though such payment was made *after*, and with full *notice of*, the *assignment*; the *cestui que use*, instead of *taking issue* on the plea, should have moved to strike it out, or replied specially the *assignment* and *notice*.

Where a party takes issue, in fact, upon an allegation not constituting a legal bar to his action, he cannot successfully ask the court to rule out testimony, if it be in proof of such allegation.

A court of law will recognize the rights of equitable assignees of *chooses in action*, and protect the rights of *cestuis que trust*, but it is done in the exercise of a *quasi equitable jurisdiction*, where an appeal is made to the justice and discretion of the court, by way of motion, the matter whereof cannot be insisted on as a legal right, or presented in the form of a plea.

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The rights of the equitable plaintiff, or person beneficially entitled, will be recognized and protected, but they must be brought to the consideration of the court in some regular form, so that they may be put in issue, and examined and passed upon by the court or the jury.

Payment by the obligor to the obligee, after notice of a *bona fide* assignment of the bond by the latter, will not operate to discharge the debt.

A blank endorsement of a single bill by the obligee, may be filled up by the assignee with the full assignment at the trial.

**APPEAL** from the Circuit Court for Carroll county.

This was an action brought in the name of Lewis Lamborn, as the *legal plaintiff*, for the *use of* Joshua Smith, against the appellant, upon a single bill for \$200, executed by the latter, and payable to said Lamborn. The declaration was in the usual form in debt, the name of Lamborn appearing as plaintiff therein, and the *use* was entered upon the writ at the time the suit was commenced. The defendant *pleaded payment "to the said plaintiff"* on the 8th of May 1854, and upon this *plea* issue was joined.

In the course of the trial one exception was taken by the defendant to the ruling of the court below, (NELSON, J.,) which, with all the facts of the case, is fully stated in the opinion of this court, and the verdict and judgment being against him, the defendant appealed.

The cause was argued before ECCLESTON, TUCK and BARROL, J.

*Joseph M. Palmer* for the appellant:

Under the *pleadings* in this case, it was clearly competent for the defendant to prove *payment* of the single bill sued on to the *legal plaintiff* in the action, by the receipt dated the 8th of May 1854. The defendant pleaded *payment* to the *legal plaintiff*, and on this *plea alone issue* was joined. The only question, therefore, submitted to the jury, was *payment vel non* to the *legal plaintiff*. No issue of fact was made by the *pleadings* as to the *bona fides* of the assignment of the single bill to Smith, for whose *use* the action was brought. If the plaintiff, Smith, had been disposed to have tried the

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fact of the assignment for value, and notice to the defendant, he should had *replied* those facts to the defendant's *plea of payment*, so as to have enabled the defendant to take issue, either of law or fact, upon such replication, but he did not do so, but joined issue on the plea of payment to the *legal plaintiff*, and it would be a *legal anomaly* to refuse to permit the defendant to *prove the plea* upon which the *issue* was joined. At common law, a bond or single bill was not assignable, so as to enable the assignee to sue in his own name, but the assignee held such assigned instrument as an equitable trustee, with power to collect the money, in the name of the assignor, for his use, and, by the modern decisions, the equitable assignee will, *upon proper pleadings*, be protected by *courts of law* against the fraudulent payment of the claim by the debtor to the assignor, *after notice*. If the plaintiff, Smith, had filed a proper replication to the defendant's plea of payment, the case would have presented quite a different question, but as it is, *under the pleadings*, the evidence was clearly admissible, and the court below erred in ruling otherwise. These principles and views are fully sustained by all the authorities. *7 Term Rep.*, 663, *Bauerman vs. Radenius*. *Ibid.*, 670, *Craig & Wife, vs. D'Aeth*, (*note.*) 1 *Bos. & Pull.*, 446, *Legh vs. Legh*. 1 *Johns. Cases*, 411, *Andrews vs. Beecker*. 3 *Johns.*, 425, *Littlefield vs. Story*. 1 *Johns.*, 531, (*note.*) 11 *Johns.*, 53, (*note.*) 19 *Johns.*, 95, *Briggs vs. Dorr*. *Chitty on Bills*, 6 to 8. *Bac. Abr. Title Assignment (A.)* What would have been the facts of the case under proper pleadings, is not for this court now to enquire. The act of 1829, ch. 51, is not applicable, as this action is brought in the name of the assignor.

*Wm. P. Mawlsby* for the appellee:

Upon all the facts set out in the record, the admission of this receipt to prove payment, would operate a fraud on the party for whose *use* the suit is brought. The assignment *in blank* was filled up by Smith, as he had a right to do, (3 *Gill*, 251, *Chesley vs. Taylor*,) and of this assignment the defendant had *notice* before the payment was made to Lamborn. The receipt offered in evidence shows that the single bill was in possession

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of Smith at that time, and the legal plaintiff promised to take it up by a given date, and deliver it to the defendant. In effect it is an agreement, between legal plaintiff and defendant, that the former will redeem the bill from Smith and deliver it up to the defendant. To admit the evidence, would be to permit a *bona fide* assignee of a *chase in action* to be defrauded by parties cognizant of his equitable rights, by collusion between themselves. To prevent such a result, and all other *fraud* and *injustice* upon them, *courts of common law* will protect the rights of *cestui que trusts*. 3 G. & J., 393, *Green vs. Johnson, et al.* 5 G. & J., 145, *Owings & Piet, vs. Low.* 7 Md. Rep., 250, *Wallis, et al., vs. Dilley, et al.* According to Maryland law and practice, there is no other way of presenting such a question as this to the court trying the case, save by *excepting to the testimony*. In such cases the *cestui que use* is regarded as the *real plaintiff*, (8 Md. Rep., 287, *Ing, et al., vs. State, use of Lewis, et al.,*) and the *plea of payment* means *payment to him*.

BAETOL, J., delivered the opinion of this court.

This suit was instituted on the 30th day of August 1856, to recover the amount of a single bill dated the 10th day of May 1853, whereby the appellant promised to pay, on or before the 10th day of May 1855, to Dr. Lewis Lamborn, two hundred dollars, with interest from date. On the back of said single bill was the following assignment:

“For value received, I assign and transfer the within single bill to Joshua Smith. L. LAMBORN.”

The declaration is, in debt, in the usual form, Lamborn being named therein as plaintiff. The use was entered at the institution of the suit. The defendant pleaded *payment*, and issue was joined.

The bill of exceptions states “that it was admitted (at the trial) that the signature of L. Lamborn, on the back of said single bill, under the assignment thereon written, which assignment over the name of said Lamborn, on the back of said single bill, was filled up by the plaintiff, Smith, at the trial of the cause, is the signature of said Lewis Lamborn, the payee

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of said single bill, and was endorsed thereon prior to the 8th day of May 1854, and was so signed on the back and delivered by said Lamborn to the said Smith, for whose use this case is entered, at the time of said endorsement, and that the defendant, Shriner, had notice of such endorsement and delivery by said Lamborn, prior to the said 8th day of May 1854; upon which the plaintiff, Smith, rested his case. The defendant then, to sustain the issue on his part, offered in evidence the following receipt, it being admitted that it was executed by Lewis Lamborn, the plaintiff above named, according to its purport, as follows:

"Received, May the 8th, 1854, of W. E. Shriner, payment in full of notes given to me by W. E. Shriner, dated the 10th day of May 1853, as follows: One of two hundred, due May 10th, 1855; one of two hundred, due May 10th, 1856; one hundred and fifty, due May 10th, 1858; and one of fifty dollars, due conditionally May 10th, 1858. These notes now in the hands of Joshua Smith, and which I promise to take up and return to W. E. Shriner, on or before the first of July next.

L. LAMBORN.

"Which evidence was offered to the jury by the defendant's counsel, to sustain the plea of payment; to the offering of which evidence, for such purpose, the plaintiff, Smith, by his counsel, objected, which objection the court sustained, and the defendant excepted."

The right of the plaintiff to fill up the blank with a full assignment, is established by the decision of the Court of Appeals, in *Chesley vs. Taylor*, 3 Gill, 251.

The single question presented for the consideration of this court is, whether the evidence offered was admissible, under the pleadings in the cause, for the purpose of proving payment?

In the determination of this question, it must not be forgotten that we are dealing with a case at law. So far as the pleadings disclose, the plaintiff is *Lewis Lamborn*. The plea in bar alleges in terms "*payment to the said plaintiff*," and on this plea issue is joined. The proof offered tended to show a payment to the plaintiff, and ought to have been admitted by

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the court; it was precisely in conformity with the plea. The Court of Appeals have said, in the case of *Mitchell, Admr., vs. Williamson*, 9 *Gill*, 77, "When a party takes issue in fact upon an allegation not constituting a legal bar to his action, he cannot successfully ask the court to rule out testimony, if it be in proof of such allegation." That principle was announced with reference to a plea in which the court say they did not perceive that the matter therein alleged proved any legal defense, or a bar to the action. And that ruling of the court, which is in conformity with the well established principles of pleading, is an authority decisive of the case before us.

There is no doubt of the soundness of many of the positions assumed by the appellee's counsel, in the argument of this cause. That a court of law will recognize the rights of equitable assignees of *choses in action*, and protect the rights of *cestui que trust*, has been repeatedly asserted; but as the Court of Appeals say, in 3 *G. & J.*, 393, "It is done in the exercise of a *quasi* equitable jurisdiction, where an appeal is made to the justice and discretion of the court, by way of motion, the matter whereof cannot be insisted on as a legal right, or presented in the form of a plea."

The same doctrine is reasserted in 5 *G. & J.*, 145, and 7 *Md. Rep.*, 250. These cases have been cited and relied upon by the appellee's counsel; but the error into which he has fallen, is in claiming the application of the principle to a case where no proceedings have been taken on the record to invoke the equitable interposition of the court on behalf of the *cestui que use*, and where the state of the pleadings is such as to confine the attention of the court and limit its powers, as a court of law, to the adjudication of the rights of the legal parties on the record. To sanction the authority claimed in this case, for the court to overlook the issue presented on the record, and to reject evidence strictly pertinent to that issue—because to admit the evidence may impair the equitable rights of the *cestui que use*—would be to break through the established limits which separate the jurisdiction of courts of law from that of courts of equity. See *Bauerman vs. Radenius*, 7 *Term Rep.*, 663. *Craig & Wife, vs. D'Aeth*, *Ibid.*, 670, (*note.*)

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entitled, will be recognized and protected; but they must be brought to the consideration of the court in some regular form, so that they may be put in issue, and examined and passed upon by the court or the jury. In suits on bonds with collateral condition, given in the name of the State, and sued on by a party interested, this is accomplished by "the party for whose use the suit is instituted, assigning proper breaches of the bond on the record, and then, on proof being offered, he may recover the amount of damages he has sustained by the breach." In such a case, this court has said, the party suing is regarded as the *real* plaintiff, although the State, technically speaking, is so. 8 Md. Rep., 295. But the case before us is not analogous to that. Here the party for whose use the suit is brought, is not made, by the pleadings, a party in the record, so that the court may recognize and pass upon his equitable rights.

It is clear that if the assignment was *bona fide*, and passed to Smith the right to the single bill sued on, no payment by the obligor to the obligee, after notice of such assignment, would operate to discharge the debt. But in such case the proper course for the plaintiff, instead of taking issue on the plea, would be either to move the court to set aside the plea, or to reply specially the assignment and notice. Either of those modes of proceeding will put in issue the right of the party claiming to be beneficially entitled, and afford to the defendant an opportunity of trying the question of the *bona fide* character of the assignment. In the case of *Legh vs. Legh*, 1 Bos. & Pull., 446, which was a case similar to this, the court, on motion, set aside the plea. Or, as we have said, the plaintiff may reply specially, setting out the assignment and notice. This is the more usual course, and many precedents may be found for such a proceeding. Among them we refer to *Andrews vs. Beecker*, 1 Johns. Cases, 411, and the authorities there cited in note (a.) See, also, *Briggs vs. Dorr*, 19 Johns., 95. *Littlefield vs. Story*, 3 Johns., 425. Such a replication puts in issue the facts upon which the rights of the assignee depend, and enables the court to recognize and protect them.

*Judgment reversed and procedendo ordered.*

(Decided June 24th, 1858.)

**STATE, use of THE MAYOR & CITY COUNCIL OF  
BALTIMORE, vs. LAMBERT S. NORWOOD, ELIZ-  
ABETH SMITH, and J. M. TURNER,**

There is no law requiring the clerk of the Court of Common Pleas to collect or receive for the Mayor and City Council of Baltimore, the five pounds tax on tavern licenses, imposed by the act of 1792, ch. 17, and his official bond, as clerk, is not, therefore, responsible for any sums he may have received on account of such tax.

It is the duty of the clerk of the Court of Common Pleas to collect the tax called "*jail fees*," imposed by the act of 1827, ch. 117, sec. 2, and his official bond is responsible for any sums he may have received on account of such tax; and the Mayor and City Council of Baltimore are the proper parties to sue his bond therefor, and not the "visitors of the jail of Baltimore city and county," incorporated by the act of 1831, ch. 58.

Any individual or body corporate, interested in a bond given by a public officer to the State, for the faithful discharge of official duties, may institute suit thereon in the name of the State, without authority expressly given for that purpose by the State.

Where, in a suit upon a bond with collateral conditions, the declaration did not assign breaches, and the parties *agreed* that "errors in pleading are waived, and either party may give in evidence such testimony as might be admissible in any form of pleading," there is no necessity to suggest breaches in the pleadings, or upon the roll, before the bond can be admitted in evidence.

**CROSS-APPEALS from the Superior Court of Baltimore city.**

This suit was brought on the 5th of May 1854, in the name of the State for the use of the Mayor and City Council of Baltimore, against Lambert S. Norwood and his sureties, upon Norwood's official bond as clerk of the Court of Common Pleas, dated the 29th of November 1851. This bond, which was duly *stamped*, was given to the State in the penalty of £5000, and contains, among others, the condition that Norwood, whilst he continues in office, "shall well and faithfully pay over to the treasurer of Maryland, all sums of money received by him for the use of the said State of Maryland, under the provisions of the constitution of the State of Maryland, or of any law now existing, or which may hereafter be passed, in the manner and at the time limited by such acts, without

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fraud or further delay, and shall well and truly account for the same with the officer or persons authorized to receive the same; and the duties of his office, and all the other duties of his said office by law imposed, legally, duly and faithfully shall discharge, according to law, and the true intent and meaning of the acts of Assembly, in such case made and provided."

The *declaration* did not assign breaches. The defendants pleaded *nil debent*, upon which issue was joined, and the parties then made the agreement, in regard to waiving errors in pleading and admitting testimony, which is set out in the opinion of this court.

The object of the suit was to recover money which the Mayor and City Council of Baltimore, the equitable plaintiffs who brought the action in the name of the State, alleged to be due to them by Norwood, and for which they insist his aforesaid official bond as clerk is answerable.

In the course of the trial *four exceptions* were taken to the rulings of the court below, (FRICK, J.,) *one* by the equitable plaintiffs, and the *others* by the defendants. These exceptions and all the facts of the case are fully stated in the opinion of this court.

The verdict and judgment were in favor of the plaintiffs for \$1785.32, with interest and costs, and *both parties* appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BARTOL, J.

C. J. M. Gwinn, C. McLean and C. H. Pitts for the defendants below:

1st. The question presented by the defendants' *first* and *third prayers*, is, whether the Mayor and City Council of Baltimore had a right to use the name of the State in entering a suit upon *this bond*, without authority from the State, even if it were conceded they had an interest in the bond? In the case of *McMechen vs. Mayor & C. C. of Balto.*, 2 H. & J., 41, it will be observed that the bond sued on was one in which the corporation had no direct pecuniary interest, and yet even here the authority of the equitable plaintiff to use the name

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of the corporation, was held by the court to be *intended after verdict*, upon the theory that it was not necessary to spread the warrant of attorney to him from the corporation, upon the record. But this case admits that the *authority* must exist at least by *intendment*. In a case of the same name, 3 *H. & J.*, 534, the reasoning of the court is not given, but there was proof in the case that the Mayor had given instructions to the register to deliver copies of the bond put in suit to any person having claims against the principal upon it. So that this case also does not show that authority to sue upon such a bond was not necessary to be given. In the cases of *Kiersted, Morrow, and Chamberlain vs. The State*, 1 *G. & J.*, 231, the name of the State was used in suits upon the bonds without authority, but, as under all the insolvent laws up to that time, there was no provision made for taking these bonds in the name of the State, and as the State had no interest in them, and its name was used as that of a convenient *representative* party, it is evident there was no reason for requiring its consent to the use of its name. So, too, in the case of *Ing, et al., vs. The State*, 8 *Md. Rep.*, 295, the suit was on an *appeal bond*, in which the State had no interest whatever, but was a nominal and representative obligee alone. These cases do not present the case of a bond made to the State, in which it is directly and pecuniarily interested, and of which it maintains the custody under the law. In such a case, it is essential to the safe maintenance of that priority in the payment of debts which is possessed by the State, (*State vs. Bank of Maryland*, 6 *G. & J.*, 226,) that no suit should be allowed to be instituted upon any security in which the State is directly interested, without the consent of the State. For the State may have good reasons for holding back from the commencement of suit, but if another party directly or indirectly interested in the bond made to it, and who has not the custody of that bond, may nevertheless put it in suit without the consent of the State, the State, as holder and obligee, may often be driven to injudicious haste, in order to avoid losing its priority at common law, or under the act of 1778, ch. 9. The true rule in cases in which the State is interested in the bond made to it as obligee, but which is

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sought to be put in suit by a private party, in the name of the State to his own use, is given by *Chief Justice Marshall*, in the case of *The Corporation of Washington vs. Young*, 10 *Wheat.*, 406, to which the attention of the court is particularly called, because the chief justice speaks of the earlier Maryland cases upon this subject. The rule is this: "No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given by the Legislature; and no person can be authorized to use the name of another without his assent, given in fact or by legal intendment." Here the legal intendment after verdict does not exist, because the question of the right to sue is directly raised by the prayers which were rejected by the court.

2nd. That the court erred in admitting the bond in connection with the list of *jail fees*, as evidence of the responsibility of the sureties and principal under the bond. In public bonds of this character, given to the State, but in which another party professes to be interested, and sues in the name of the State, as equitable plaintiff, such equitable plaintiff (the right to sue being conceded) is to "be regarded as the real plaintiff," (8 *Md. Rep.*, 295,) and no evidence is admissible in favor of the claim, therefore, which does not show a right vested in the equitable plaintiff, and a responsibility to such equitable plaintiff on the part of the obligors. It is not enough to show that there is a responsibility to *somebody*, in order to make the evidence admissible. In this case the right to these *jail fees* was not legally in the Mayor and City Council of Baltimore, and they had, by law, no right to receive them, and, therefore, the evidence was improperly allowed to be given. The act of 1827, ch. 117, sec. 2, provides that no person shall be allowed to sell liquors by retail, unless he shall pay to the clerk therefor, in addition to the sum required for his license, the further sum of four dollars for every such license, "the said further sum to be applied to the payment of the expenses of the jail of the said city and county of Baltimore, so far as the same are chargeable to, and to be borne by, the city of Baltimore." Now the question is, who had the right to receive and apply these *jail fees*, as indicated in this act, for the act itself is silent on this

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subject? By the act of 1831, ch. 58, sec. 1, the Visitors of Baltimore city and county jail were instituted a body politic and *corporate*, with power to exercise all the rights and privileges of a corporate body as fully as any other corporate body could exercise them. By the same act, sec. 15, they were directed to make out an accurate account of all the public money received by them from the register of the city of Baltimore, or from any other source, for the use of the city of Baltimore; and by sec. 13, they are charged with the whole revenue of the jail. The act of 1838, ch. 75, does not change the corporate character, or the duties of this body of visitors. Now, since these visitors exercise a corporate privilege as great as that which is possessed by the city of Baltimore, and are placed by the law exclusively in charge of the revenues appropriated to the use of the city and county jail, and since this was a special fund, to be appropriated to the single purpose of these expenses, these visitors ought to have been the equitable plaintiffs, and *not* the Mayor and City Council of Baltimore; the latter having no other right in regard thereto than the benefit which, under the act of 1827, ch. 117, accrues to them from the appropriation of the sum derived from the liquor license to the partial payment of the expenses which they were liable for on account of said jail. And, generally, it may be said that the securities to this bond "cannot be answerable beyond their engagement," (2 H. & J., 45,) and it is plain that by this bond the engagement is to the State, or its officer, and to none other, and this view excludes the responsibility for those fees on this bond.

3rd. The appeal of the equitable plaintiff presents the question, whether it was the duty of Norwood, as clerk of the Court of Common Pleas, to collect the money for the *ordinary* licenses? The first act which relates to licenses for ordinaries, is that of March session, 1780, ch. 24, which makes no provision for the payment of any portion of the fees derived from such licenses to Baltimore town. This act was defective, because it did not determine *who* were to receive these fees, or to account for them to the State. The act of June 1780, ch. 8, sec. 9, provided for this omission, by making it the duty of the

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clerks of the county courts to receive and account for the moneys received for ordinary licenses to the State treasury. There was no provision at this time for the payment of any tax or fee on such license to any other than the State. The law of November session, 1782, ch. 17, sec. 1, which was an act for the more effectual paving of the streets of Baltimore town, provided for the levy of several special taxes which were to be appropriated to this purpose. Among these were taxes on riding carriages, wagons, carts, and *an additional tax of five pounds on tavern licenses.* By the same act, sec. 18, the *special commissioners* who were incorporated by the 45th section thereof, were given full power to appoint a person or persons, properly qualified, to act in the collection of said taxes, of which this very tax on ordinaries was one, and it is, therefore, manifest that under *this law* it was not the duty of the clerks of the county courts to receive these taxes, and therefore not their duty to receive this tax on ordinaries *in their capacity as clerks.* There was no omission *in this law* of care to provide for the proper payment of the moneys thus collected, for the good conduct of these agents is enforced by the same act, secs. 20, 22, 23. There was nothing in this act to prevent the special commissioners from appointing the clerk of the county court their collector, if they saw proper, but it is evident that if they did, he was responsible, under the law, *as collector, and not as clerk,* for the license money that thus came into his hands. By the act of 1796, ch. 68, erecting Baltimore town into a city, the powers of these special commissioners were vested in the corporation, and from that day to the present time, the law relating to these taxes or ordinary licenses has been left untouched; that is, the Mayor and City Council have the power to appoint a collector for this tax, and to hold him to an accountability, under the law of 1782, ch. 17, but under this law it is not, and when these taxes on ordinaries were received by Norwood, it was not, the province or the duty of Norwood, as clerk of the Court of Common Pleas, (to the clerk of which court came in due time the right to issue licenses for ordinaries,) to receive this tax or license for ordinaries. The acts of 1823, ch. 217; 1827, ch. 117; 1831, ch.

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298; 1841, ch. 40; 1852, ch. 308; and 1853, ch. 444, leave the state of things as they existed in 1782, unaltered. The corporation has neglected to provide for its own security, and it cannot visit this omission upon the securities to this bond, who are responsible only to the extent of their engagement.

*B. C. Pressman and G. L. Dulany* for the Mayor and City Council of Baltimore:

The defendants below, by *their first exception* in this case, object to the ruling of the court below, admitting in evidence the bond sued on, because, as they insist, the name of the State cannot be used by the equitable plaintiff without her consent being given. This position is novel in its character, as the practice of using the name of the State in actions upon public bonds, by the parties interested, has hitherto been unquestioned. The State, by legislation, has guarded herself against the imposition of costs, by requiring "*the use*" to be entered by the clerk of the court. *Act of 1794, ch. 54, sec. 10.* The cases of *McMechen vs. Mayor & C. C. of Balto.*, in 2 *H. & J.*, 41, and 3 *H. & J.*, 534, referred to by the defendants' counsel, do not lend any sanction to the denial of this right, but, on the contrary, sustain it, though the arguments of counsel, similar for the most part to those now urged by the defendants, would apply more strongly to actions of the character of those suits, which were brought without authority in the name of the Mayor and City Council of Baltimore, by parties interested in an auctioneer's bond, than to public bonds given to the State. Neither is there much force in the supposition of the defendants, that because the Mayor had, in one of those cases, ordered copies of the bond to be given with a view to suit, that, therefore, the consent of the Mayor and City Council might be assumed by intendment. This is, perhaps, an ingenious and plausible theory, but as the court has not so said in their opinion, and as it does not appear among the points urged by counsel, we do not think it had a controlling influence in the decision pronounced by the court. In truth, had it been necessary to establish the authority or assent of the corporation to the institution of such suit, under the

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limited powers prescribed to the executive officer of the city, his assent, merely, would not have been sufficient.

The defendants, in *their second exception*, object to the ruling of the court, admitting the bond in connection with the list of *jail fees*, because, as they contend in argument, the right to these *jail fees* was not legally in the Mayor and City Council of Baltimore, but was vested in the visitors of Baltimore city and county jail. Although this objection, if sustained, is but of a technical character, and will not defeat substantially the plaintiffs' claim, yet we do not think it entitled to much force. These *jail fees* being intended to lighten the expenses of the city and county in support of the institution owned jointly by the city and county, and constituting but a small part of such expenses, have been at all times paid into the city treasury directly by the State's officer holding the post of clerk of the City Court of Baltimore, who, prior to the new constitution, which has conferred the power upon the clerk of the Court of Common Pleas to "issue all marriage and other licenses required by law," was authorized to receive this license money. The Mayor and City Council have provided in their ordinances for the receipt by the register of all license money, and being clothed with authority to pass all ordinances requisite for the purpose of carrying into effect the powers conferred upon the city, they have enacted ordinances prescribing the mode of appointing visitors to the jail, and the power of removal or substitution of these officers by the Mayor and City Council, has never been questioned, and in all their acts they set forth their agency. See *Act of 1838, ch. 75, secs. 1, 2,* and *Revised Ordinances 1850, No. 8.*

The plaintiffs below, in *their exception*, object to the ruling of the court excluding the testimony by which it was proved that Norwood had received \$14,613.95 for licenses for ordinaries, and that this sum had not been paid into the city treasury. Now it is conceded by the defendants that the Mayor and City Council of Baltimore are entitled, under the law of 1782, ch. 17, to these taxes on ordinaries, but they insist that if the clerk of the Court of Common Pleas collected them, his sureties are not responsible on his bond. We refer the

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court to the 4th Art. of the Constitution, sec. 15, in which the authority is given to the clerk of this court to issue "all marriage and other licenses required by law," as clearly conferring upon him, alone, the right to receive the money arising from ordinary licenses, and it would not have been competent for the Mayor and City Council of Baltimore to provide for the appointment of any other collector. All acts of Assembly inconsistent with this provision are repealed. Independently of this liability under the constitution, we refer to the case of *Laurenson vs. The State*, 7 H. & J., 339, as affirming the doctrine that no principal or surety upon a collector's bond can escape from responsibility for moneys collected by the principal, by virtue or color of office.

ECCLESTON, J., delivered the opinion of this court.

The suit in which these cross-appeals have been taken, was instituted in the Superior court of Baltimore, in the name of the State use of the Mayor and City Council of Baltimore, against Lambert S. Norwood, Elizabeth Smith and Joshua M. Turner, on the 5th of May 1854. The object of the suit was to recover money alleged to be due the equitable plaintiffs, under a bond dated the 29th of November 1851, given to the State by Norwood, as clerk of the court of Common Pleas for the city of Baltimore, the penalty of the bond being five thousand pounds.

The declaration is in the form commonly used in suits upon bonds with collateral conditions, when breaches are not assigned by the *nur*. Neither the original bond nor a copy thereof was filed with the declaration. The defendants pleaded *nil debent*, to which issue was joined, and the parties made the following agreement:

"It is agreed in this case that errors in pleading are waived, and either party may give in evidence such testimony as might be admissible in any form of pleading, and that a copy of the bond may be offered to have the same effect as if the original was produced, the testimony to be taken subject to exceptions."

At the trial of the cause, the first bill of exceptions was taken by the equitable plaintiffs. They offered in evidence an ac-

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count or list of ordinary licenses, marked and returned to the city register's office by Lambert S. Norwood, clerk of the court of Common Pleas for the city of Baltimore, showing that the amount which he charged as due the city, and remained unpaid, from May 1st, 1853, was \$14,613,95; which list or statement, the parties agreed should be used in lieu of the original lists. And the plaintiffs proved by J. J. Graves, city register, that said account or list was returned by Lambert S. Norwood clerk of the Court of Common Pleas, and that the moneys received by him, as set forth by him in said account, as having been received by him for ordinary licenses, had not been paid to the city treasury. To the admission of which account and evidence the defendants' counsel objected, contending that the plaintiffs had shown no title to said money, and that Norwood as clerk, was not bound to collect and pay over the moneys collected by him for ordinary licenses, which objection the court sustained. And upon this decision the plaintiffs' appeal is based.

They insist upon their right to recover from the defendants, money alleged to have been received by Norwood, as clerk of the Court of Common Pleas, for the use of the city of Baltimore, under the act of November session 1782, ch. 17. This act was passed for the more effectual paving of the streets of Baltimore town, and for other purposes; by which several special taxes were imposed. Among these were taxes on carts, riding horses, billiard tables, &c., and "*an additional tax of five pounds annually on tavern licenses.*"

The 45th section of this act, made the then special commissioners a body corporate, by the name of "Special Commissioners for Baltimore Town." And the 18th section of the same act gave these commissioners "full power to appoint a person or persons properly qualified, to act as collector or collectors of the taxes before mentioned;" the tax on ordinary or tavern licenses being one of those "before mentioned," and not excepted out of the general authority given to such collector when appointed.

This tax and others were likewise authorized to be collected by distress, as may be seen by reference to the act of 1792, ch. 21.

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By the law of 1796, ch. 68, Baltimore town was made a city, and all the powers then possessed by the special commissioners were conferred upon the new corporation. By this change, instead of the commissioners the "Mayor and City Council of Baltimore" became authorized to appoint a collector of the five pound and other taxes.

The act of June session 1780, ch. 8, sec. 9, is the first law, which, in terms, directed the clerks of the county courts to receive and account for moneys payable for ordinary licenses. The entire amounts to be received for such licenses, were then due to the State alone. Since 1780, different laws in regard to money *due the State*, for ordinary and other licenses in Baltimore, have made the same payable, at one time, to the clerk of the court of oyer and terminer, afterwards to the clerk of the city court, and then to the clerk of the court of Common Pleas.

The act of 1804, ch. 65, in the latter part of its 4th sec. provides, that the clerk of the court of oyer and terminer, "shall also receive all sums of money payable for any licenses granted in virtue of this act, and account for the same according to law, as the clerk of Baltimore county court is now required to do." We see nothing in this act which imposes any duty upon the clerk of the court of oyer and terminer, in relation to the tax now under consideration; believing, as we do, that it never was made the duty of the clerk of Baltimore county court to collect this tax.

With much care we have examined the laws generally, having any relation to ordinary and other licenses, and particularly those already mentioned, as well as the following: March session 1780, ch. 24, sec. 1; 1791, ch. 58; 1816, ch. 193, sec. 14; 1816, ch. 242; 1822, ch. 217; 1827, ch. 117; 1831, ch. 262; 1831, ch. 298; 1838, ch. 414; special session of March 1841, ch. 40; and 1852, ch. 308, the last clause of section 1.

This examination has not enabled us to find any direction or authority, given in express terms or by necessary implication, to the clerk of Baltimore county court, to the clerk of the Court of Common Pleas, or to the clerk of any other court, to collect or receive this five pound tax. And seeing that the

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act of 1782, ch. 17, provides for its collection by a person or persons to be appointed for that purpose; and the act of 1792, authorises it to be collected by distress; we do not perceive either a necessity, or any authority, for so construing the laws on the subject, as to make it the duty of the clerk of the Court of Common Pleas to receive the tax.

If there was evidence showing that Norwood, whilst clerk of the court, was appointed a collector, as provided for by the act of 1782, such an appointment could not impose upon him any responsibility in his character as clerk; there being no law requiring the clerk, as such, to perform the duty. If, therefore, by virtue of any appointment from the Mayor and City Council, or in consequence of any arrangement or understanding between them and Norwood, he has been receiving this tax, he may be personally answerable for the same, but his official bond, as clerk, is not.

Believing these views to be correct, we think the city is not entitled to any portion of the claim relied upon in regard to ordinary licenses, under the act of 1782; consequently the plaintiffs' bill of exceptions shows no error on the part of the court below, and therefore, the decision appealed from by the plaintiffs will be affirmed.

In the further progress of the cause, the defendants took three bills of exceptions. The verdict and judgment being against them they appealed.

From the first of these exceptions it appears, that after giving in evidence the agreement already stated, with relation to waiving errors in pleading, and the admission of such evidence as might be given in any form of pleading, the plaintiffs offered a copy of the bond mentioned in the *mar.* By the condition of which bond, among other things, it is provided, that Norwood, as clerk of the Court of Common Pleas, should well and faithfully pay over to the Treasurer of Maryland, all sums of money received by him for the use of the State of Maryland, under the provisions of the constitution of the said State, or of any law then existing, or which might thereafter be passed in the manner and at the time limited by such acts without fraud or further delay, and should well and truly account for the

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same with the officer, or person or persons authorised to receive the same, and the duties of his office, and all the other duties of his office by law imposed, legally, duly and faithfully should discharge according to law, and the true intent and meaning of the acts of Assembly in such cases made and provided. To the admissibility of this bond the defendants objected, but the court overruled the objection, and they excepted.

The defendants' second bill of exceptions, shows that the plaintiffs offered in evidence the following agreement:

"It is admitted, that by the list of jail fees marked Exhibit No. 1, returned to the city register's office, by Lambert S. Norwood, clerk of the Court of Common Pleas, it appears that the amount which he charges as due the city, and which remains unpaid from May 1st, 1853, to June 1st, 1853, is \$1950.72, and it is agreed that this statement shall be inserted in the record in lieu of the original list."

And the plaintiffs offered evidence by John J. Graves, register of the city, that said account was returned by Lambert S. Norwood, clerk of the Court of Common Pleas for the city, and that the moneys received by him as appears by said account or list, were not paid to the city treasury. To which evidence the defendants objected, but the objection was not sustained by the court.

The defendants then asked three prayers, all of which were refused; upon which action of the court the defendants based their third exception.

The 1st prayer asks the court to instruct the jury, that there is no evidence in this cause to sustain the plaintiffs' right to recover in this suit.

The 2nd is, "that if the jury believe from the evidence, that a judgment has been recovered against the defendants or any of them, on the bond offered in evidence in this suit, then the plaintiff is not entitled to recover in this case, for any sum of money which they may find Lambert S. Norwood received under the act of 1827, ch. 117, sec. 2nd."

And the 3rd prayer is, "that upon the pleadings, agreement and evidence in this cause, the plaintiff is not entitled to recover in this suit."

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Whilst considering the appeal of the defendants, it must be borne in mind, that in deciding the plaintiffs' appeal, we have said they have no right to recover under the bond in controversy, for any moneys received by Norwood, on account of ordinary licenses. This being so, it follows necessarily, that in regard to questions presented by the defendants' appeal, no claim on account of those licenses can be of any avail to the plaintiffs.

The only claim now to be examined is, how far the bond of the clerk, as such, is answerable for moneys received by him under the act of 1827, ch. 117, sec. 2, for what are usually called "jail fees."

This act directs the sum of *twelve dollars* to be paid to the clerk of Baltimore city court, for the *use of the State*, by every person or body corporate, applying for a license to sell goods, wares or merchandize in the city; and it provides, that such license shall not "authorize any person or persons, body or bodies corporate or politic, to sell or barter spirituous or fermented liquor, by retail or in quantities less than ten gallons, and not less than a pint, within the city of Baltimore, unless the person or persons, body or bodies corporate or politic, obtaining such license, shall pay to the clerk of Baltimore city court, in addition to the twelve dollars aforesaid, the further sum of *four dollars* for every such license; the said further sum to be applied to the payment of the *expenses of the gaol*, of the said city and county of Baltimore, so far as the same are chargeable to, and to be borne by, the city of Baltimore."

As the law directs the four dollars to be paid "to the clerk of Baltimore city court," no question like that, in reference to ordinary licenses, as to who was to collect or receive the same, can here be made. and inasmuch as the duties of that clerk, in regard to such matters, have been transferred to the clerk of the Court of Common Pleas, there can be no doubt but that his official bond is responsible for the jail fees. The defendants however contend, that admitting the bond to be answerable, still the present equitable plaintiffs are not the proper parties to institute the suit; because, if without the express authority of the State, any suit upon the bond could be sustained,

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it could only be by making the "visitors of the jail of Baltimore city and county" the equitable plaintiffs. In support of this view, reference has been made to the act of 1831, ch. 58, the first section of which constituted these visitors a *body politic and corporate*, with "all the powers, authorities and privileges of a corporate body, so far as the same are necessary to a due discharge of their duties, as fully to all intents and purposes as any other corporate body might or could have and exercise." Among the duties and powers prescribed for these visitors by this law, the 13th section provides, that they "shall keep regular books of accounts, in which the whole expenses of the jail, whether for supplies, salaries of officers, repairs or incidentals, shall be distinctly stated, as also all the receipts and expenditures upon the different dockets, in such a manner, as that these accounts may show what is chargeable to Baltimore county, and what chargeable to Baltimore city."

The 16th section enacts, "that the said visitors shall annually make out a full statement of all the public money received by them from the register of the city of Baltimore, or from any other source for the use of the city of Baltimore, and the manner in which it has been expended; which statement shall be laid before the Mayor and City Council of Baltimore, together with an estimate of what will be necessary for the following year, the amount of which estimate shall be levied on the property in the city of Baltimore, and paid to the visitors of the jail."

It has been contended by the defendants, that the sections of the law, which have been mentioned, give to these visitors, and not to the Mayor and City Council, the right to demand and receive, directly from the clerk of the Court of Common Pleas, the jail fees made payable under the act of 1827. But we do not consider this a correct view of the subject. When that act was passed the visitors had no existence as a corporation. The Mayor and City Council, however, were then the corporate body, having the control and management of the affairs of the city. And as the law provided, that the fees in dispute should be applied to the payment of the expenses of the jail of the city and county of Baltimore, so far as the same

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were chargeable to, and to be borne by, the city, we think the Mayor and City Council then had the right to demand those fees from the clerk, whose duty it was to collect them from persons obtaining licenses. This right has not been transferred to the visitors, by any express language in the act of 1831, or by any necessary implication, so far as we have been able to discover, after a careful examination of its provisions. In reference to money transactions, the principal powers and duties of the visitors seem to be, that they are to estimate what amount it will be necessary for the city to provide for each year on account of jail expenditures, and that the application and expenditure of the same shall be made under the direction of the visitors, the city authorities being required to provide for the amount so estimated. And inasmuch as the duty of providing the means necessary to meet its quota of jail expenses, is imposed upon the city, it is but reasonable to suppose, the Legislature designed that the fees arising under the act of 1827, and thereby expressly directed to be applied for the relief of the city, in regard to its liability for a portion of such expenses, should go into the city treasury. This we consider a correct interpretation of the intention of the Legislature, as manifested by the laws on the subject. The Mayor and City Council, therefore, had a legal claim for the jail fees received by Norwood as clerk.

Admitting they had, still the defendants insist, that they cannot recover any portion of the fees in this case, unless it can be shown that the suit was instituted for the use of the equitable plaintiffs, by authority from the State given for that purpose. But in our opinion, the decisions in Maryland fully establish the doctrine, that there is no necessity for obtaining permission or authority from the State, to institute such a suit as the present, upon the official bond of the clerk.

In *Kirsted, Morrow and Chamberlain, vs. The State, &c.*, 1 G. & J., 248, the bond sued upon was taken in the name of the State, although no law expressly directed it to be so taken. The bond was given by an insolvent petitioner, conditioned for his appearance to answer the allegations of his creditors.

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Two other cases of like character with the one above stated, were argued at the same time, and the court decided them all in the same opinion. It is there said; "Another question insisted on by the appellants in the argument of this cause is, whether the appellees could sue these bonds for their use, there being no provision in any of the insolvent acts, to enable them thus to sue. This point we consider settled in this court, by the cases of *McMechen vs. The Mayor and City Council of Baltimore, use of A. Storey*, and *McMechen vs. The Mayor and City Council of Baltimore, use of Hollingsworth & Williams*, 2 Harr. & Johns., 41, and 3 Harr. & Johns., 534. They were suits on an auctioneer's bond, taken under an ordinance of the city, which did not authorize any person in particular, to sue it. They were nevertheless sustained, and the judgment of the county court therein affirmed by this court."

This opinion it will be seen was delivered, between four and five years after the decision of the Supreme court of the United States, in *Corporation of Washington, vs. Young*, 10 Wheat., 406, to which the defendants have referred.

In the case of *Ing & Mills, vs. State use of Lewis & McCay*, 8 Md. Rep., 294, the court say, "for a great length of time it has been the uniform practice in this State, in cases like and similar to the present, to institute the suit in the name of the State, causing the names of the parties for whose benefit it is prosecuted, to be endorsed on the writ and declaration." After speaking of the act of 1835, ch. 380, sec. 7, as providing that a court of equity may, in some cases, direct bonds to be taken in the name of the State, as obligee, which may be used by any person interested, as *public bonds* may, the court then say, "and even prior to the passage of the act of 1835, the Court of Appeals held, in 1 Gill & Johnson, 231, that the uniform practice, for twenty years, allowed persons interested to bring suits on bonds taken in the name of the State, although the acts of Assembly, under which they are required to be executed, contain no specific provision for making them to the State, or give to the party, in language, the right to sue. These references are sufficient to show the suit was properly brought.

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There is no doubt that it is incumbent on the party suing on the bond, to show he has an interest in it before he could recover in a regular trial prosecuted to verdict."

The laws which provide for the execution of bonds, similar to the one before us, do not require them for the purpose of protecting the rights of the State alone. They are also designed to secure the faithful performance of official duties, in the discharge of which, individuals and corporations have a deep interest, and therefore they should have the privilege of suing such bonds for injuries sustained by them, through the negligence or mal-conduct of the officers. Such doctrine, in regard to public official bonds, we consider as having been long established in Maryland, whatever may be the law elsewhere. And entertaining these views we cannot agree with the defendants' counsel, in supposing the present equitable plaintiffs could not institute this suit, because they had not obtained authority from the State for that purpose. In addition to the Maryland cases, which have been cited, see also *State vs. Dorsey, et al.*, 3 G. & J., 92, 93.

Under the agreement waiving errors in pleading, and allowing such evidence to be given as might be admissible in any form of pleading, &c., there was no necessity to suggest breaches in the pleadings or upon the roll. An agreement of this sort is to be found in the case of *Laurenson vs. The State, &c.*, 7 Harr. & Johns., 339. There an objection to the pleadings, for the want of breaches, was relied upon, the suit being upon a bond with a collateral condition. The court held the objection to be fatal, unless cured by the agreement; which they thought was a very loose course of proceeding, but nevertheless the court sanctioned it, and held its true meaning to be a waiver, on both sides, of all errors in the pleadings, and to dispense with the necessity for assigning breaches.

The principles which have been announced in this opinion, we deem sufficient to show that the court did right in admitting the bond objected to by the defendants, in their first bill of exceptions; and that there was no error in overruling the defendants' objection to the admission of the evidence offered, as set forth in their second exception.

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In our opinion, there is evidence tending to establish the right of the equitable plaintiffs to recover for jail fees, and therefore the court committed no error in refusing to grant either the first or third prayers of the defendants, stated in their third bill of exceptions. And their second prayer was properly rejected, because there was no proof in support of it.

We affirm the decisions in both appeals.

*Judgment affirmed.*

(Decided June 24th, 1858.)

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**STATE, use of THE MAYOR & CITY COUNCIL OF BALTIMORE, vs. LAMBERT S. NORWOOD, ELIZABETH SMITH, J. M. TURNER and J. W. WATKINS.**

In a suit upon a bond with collateral conditions, brought in the name of the State, for the use of the equitable plaintiffs, the declaration did not assign breaches, and the parties agreed that "errors in pleading on both sides be waived, and that either party may give in evidence any testimony which might have been offered in any state of the pleadings." HELD:

That under this agreement breaches need not be suggested in the pleadings, or upon the roll, and the bond sued on must be admitted in evidence, even though the counsel for the equitable plaintiffs, when asked, refused to state what breach of the bond he intended to rely upon.

The act of 1856, ch. 352, repealing the stamp laws, removes all objection to a bond for want of a stamp, and authorizes the appellate court to reverse the decision of an inferior court, refusing to admit the bond in evidence because not stamped, though the repealing act was not passed until after such decision was made.

The stamp laws did not design or profess to confer upon the citizens of the State any private benefits or rights, but operated to impose burdens upon them for State purposes, which the Legislature had full authority to remove at any time, by a repealing act.

As a general rule, where the interpretation of a statute is doubtful, in respect to pre-existing contracts, it will be construed as operating prospectively, but when the language of a statute clearly indicates an intention that it shall have a retroactive effect, it must be so applied.

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APPEAL from the Superior Court of Baltimore city.

This action was brought on the 5th of May 1854, in the name of the State, for the use of the Mayor and City Council of Baltimore, against Lambert S. Norwood and his sureties, upon the official bond of Norwood, as clerk of the Court of Common Pleas, dated the 29th of June 1853. This bond was not *stamped*, and was given to the State in the penalty of \$50,000, and conditioned in the same manner as the bond in the preceding case.

The *declaration* and *plea* were the same as those in the preceding case, and the agreement in regard to waiving errors in pleading, and admitting testimony, is set out in the opinion of this court.

In the course of the trial an exception was taken by the ruling of the court below, (FRICK, J.) which is fully stated in the opinion of this court, and the verdict and judgment being in favor of the defendants, the plaintiffs appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BARTOL, J.

*B. C. Presstman and G. L. Dulany for the appellants:*

The appellants insist that the *agreement* made by counsel before the trial, is sufficient, in itself, to meet the objections to the admissibility of the bond in evidence, on which this suit was instituted. Although the appellees appear unwilling that the "*reasoning*" of the court below should be considered as within the range of the exception, but simply the "*conclusion*" at which the court arrive, we have not been able to discover, in the appellees' argument, any other reasons for the ruling of the court, than those given by the judge who presided at the trial. The fact, then, that the bond was *unstamped*, and that the pleadings were defective, no breaches having been assigned, are the only objections the appellants are required to meet.

The true effect of a somewhat similar agreement, has been settled by this court in the case of *Laurenson vs. The State*, 7 H. & J., 339, where the court say that the want of breaches assigned in an action on a bond with a collateral condition,

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would be fatal, but for the *waiver* made by such an agreement. The agreement in that case was somewhat ambiguous, and it was insisted by counsel that it was confined to the benefit of the defendant. In our case, it was for the mutual benefit of plaintiffs and defendants. Another view of this objection is, that the docket of the court below disclosed the fact that no party other than the State as legal plaintiff, and the Mayor and City Council of Baltimore as the equitable plaintiffs, were interested in this suit. The suggestion, therefore, that it was possible that the suit was on a bond originally made for the benefit of the State alone, but entered, by reason of some independent transaction, for the use of another party, is not entitled to weigh any thing in the discussion of the question.

The next question is, was this such a bond as needed a stamp for the purpose of this suit, viz: the recovery of money alleged to be due by the defendants to the Mayor and City Council of Baltimore, it being admitted that it did not require a stamp to make it obligatory for the recovery of any claim due under it to the State? We insist that wherever a bond is required to be given by a public officer to whom is entrusted the collection of the revenue of the State as well as that of a body politic, such as the municipal corporation of Baltimore, and where, by the provisions of the law under which he is elected, as in this case, his duties are prescribed, and the custody of the bond to be given by him is placed in the State's officer, and where the approval of his bond, likewise, as in this case, is also confided to another officer of the State, it would be unauthorized for any other form of bond to be demanded of him by any party interested in the money which he, by virtue or color of his office, might receive. It is plain, therefore, that if the doctrine contended for by the appellees be correct, a State officer of this description might become a legalized plunderer, guarded, indeed, by the panoply which the State has thrown around him. Can the same bond be good for the purposes of the State, and utterly worthless for the protection of others, whose interest she alone is competent to guard? There must be vice lurking somewhere in any argument sustaining such a legal proposition. Since the very

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able and sound theory of the relations sustained by political bodies corporate to the State sovereignty, pronounced by Chief Justice Taney, in the case of *The State of Maryland vs. The Baltimore & Ohio Rail Road Co.*, 3 How., 549, 550, there can hardly be a doubt that these corporations are but agents of the State, and, as such, are to be regarded as but her ministers and stewards, under whatever name they may act. This bond is virtually one given to the State, although covering revenue due to the corporation of Baltimore. The correctness of this reasoning is never more apparent than in considering the issues involved in this controversy, where a distinction is sought to be made, by which a public officer of the State may be entrusted with power to collect large sums of money due to a portion of the citizens of the State, whose ability to pay State taxation may depend upon the security of liabilities to them, entered into by State officers, and be allowed to escape responsibility in the delicate—the most delicate—trust of collecting revenue. We rest with confidence on the grounds stated in the case of *Laurenson vs. The State*, already cited, as maintaining this salutary doctrine, which is based so firmly in morals, as well as in law, that no public officer shall be allowed to take advantage of his own wrong, and shield himself, after obtaining public moneys, with the unprincipled assumption that he had acted beyond the bounds of his authority, or had not complied with obligations resting upon him as a condition of office. But supposing this view is untenable, we still rely upon the reasoning of the court in *State vs. Milburn*, 9 Gill, 116, 118, where, in considering the effect of requiring bonds given to the State to be stamped, the failure to provide, under the act of 1844, ch. 280, sec. 8, for curing the defect of the want of stamp in bonds given to the State, is pointed out. If this view be entitled to weight by parity of reasoning, it should avail where, as in this case, by the entire absence of any provision of law to enable any officer of the corporation of Baltimore to remedy this defect, so as to exempt the city from loss. Indeed, if it be true that for this reason the exemption is made in behalf of the State, *a fortiori*, it should be made in behalf of the city.

Lastly, we insist that the defect for want of a stamp, if it

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be one, is no longer available to the appellees, since the passage of the act of 1856, ch. 352, secs. 4, 5, which repeal the stamp laws, and make valid all obligations which may have been executed without stamps, and that the appellants are entitled to a reversal of the ruling of the court in this case, notwithstanding the court may have been right at the time of passing upon its admissibility in the trial below. 1 *Cranch*, 110, *United States vs. Schooner Peggy*. Neither does this case fall within the category of cases where private rights may be interfered with by unjust legislation. On the contrary, the appellants insist that in this case the legislation was based upon sound policy, the effect of which is not to produce injustice, but rather to subserve the ends of equity and good conscience, by repealing provisions of laws designed for a different purpose than that sought to be accomplished by the appellees in this case.

*John Stewart, C. J. M. Gwinne and Chas. H. Pitts* for the appellees:

The appellees say that the court below was, under the circumstances disclosed by the record, right in refusing to allow the bond to be read in evidence. Let us examine the case as it stood before the court. The plaintiff had declared that the defendants were indebted to the State, for the use of the Mayor and City Council of Baltimore, on a certain bond in the sum of \$50,000. Now it is plain that from such a bond several inferences might be drawn. It was possible the suit was on a bond originally made for the benefit of the State alone, but entered, *by reason of some independent transaction*, to the use of another party. It was also possible the suit was for the benefit of the party for whose use it was entered, by reason of some actual, original and subsisting interest in the conditions of the bond. The court will see that the cases which the defendants would be required to meet, would radically differ, according as the one or other of these hypotheses might prove to be true. If the pleadings had been regular, the declaration, or, in conformity with the practice in this State, the replication, (*Scott vs. State, use of Ducker*, 2 *Md. Rep.*, 290,) would neces-

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sarily have shown the breaches on which the plaintiff in interest proposed to rely, and the defendants would then have known what they had to answer. But the pleadings were not regular, and the defendants could not tell from the declaration filed, because of the divers claims such a declaration might cover, whether breaches *quoad* the State, or *quoad* the city, were intended to be relied on in the offer of the bond in evidence. Therefore, though errors in pleading were waived, yet as the agreement was that the plaintiff might give that in evidence which he could have given in "*any state of pleadings*," and as by this must have been meant any *correct* state of pleadings, it was incumbent on the plaintiff, when he offered the bond, to show *orally* to the court the state of pleadings which might have existed, and which would, if it had existed, have justified the introduction of the testimony. And, in showing such state of the pleadings, the equitable plaintiff must have shown the breaches on which he relied; for, even if the equitable plaintiff had been able to trace argumentatively, by construction of statute laws, an interest in the bond, that interest was of no moment in the particular suit, unless a breach could be shown affecting him, the city being regarded as the real plaintiff, though the State, technically speaking, is so. *Ing, et al., vs. State, use of Lewis, et al.*, 8 Md. Rep., 295. For how, without such setting forth of the breaches, in some way, would the jury be able to assess the damages? It was not necessary, under the agreement, that the breaches should have been shown in the *pleadings*, but it was necessary they should have been supported on the *roll*, in order that the case should proceed at all. *Chamner vs. State, use of Beall*, 9 Gill, 281. In the absence of an averment of a breach in which this equitable plaintiff was interested, there was on the face of the paper offered no sign even that it was relevant testimony. And though the rule is, that the court, "not seeing clearly" that such evidence "is wholly foreign and irrelevant to the issue, and cannot be connected with it by other facts and circumstances," may "admit the proof on the assurance of counsel that it will turn out pertinent and material," (*Haney vs. Marshall*, 9 Md. Rep., 213,) yet there is no such rule where

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"no such assurance was given," (*Marshall vs. Haney*, 4 Md. Rep., 510,) and still less where, as in this case, the plaintiffs' counsel refused to give the assurance or any information as to his meaning or purpose in offering the evidence. It seems, therefore, in our view, there is no question but that the court was right, under the circumstances, in refusing to admit the bond to be read in evidence. Nor is it believed the appellants' case is made better by the appearance in the record of what was *said* by the court when the bond was rejected. These expressions of the court are not *rulings* in the sense in which they seem to be taken by the appellants. The only *ruling* of the court was the refusal to admit the bond in evidence; all else that was declared by the court, and which stands in the record, was but the *reason* given by the court for its *ruling*. The sufficiency or insufficiency of the method by which the court arrived at a conclusion, is not a proper subject of exception; the conclusion it came to is the sole ground to be reviewed. We do not mean to be understood as saying there are not cases in which reasoning and illustration, taking the form of propositions, may not be made the subject of exception, when uttered by a court at the trial of a cause. The case of *Soverwein vs. Jones*, 7 G. & J., 339, perhaps, proves the contrary. But such reasoning and illustration, to be the subject of an exception, must be in such shape as that if it is wrong, the jury will be misled by it. This is the ground of the decision in the case referred to. But where there is no jury, and where the reasoning of the court in its rulings does not affect the jury, because that ruling takes the case from the jury, and, therefore, cannot influence them, such reasoning, if it be wrong even, cannot be made the subject of an exception. This direct and single point ruled, without regard to the reasons why it was so ruled, is the only question open for review in the Court of Appeals.

We cannot believe this court will take a different view of this question, but if they do, we then insist that what was said by the court below was *law*. The court simply decided that the bond offered in evidence was not admissible to prove any breach in which the city was interested, because it was not

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*stamped.* That the court was, on the 12th of December 1854, right in this proposition of law, is plain from the case of *The State vs. Milburn*, 9 *Gill*, 116. So stood the law when the record in this case was made up, which record, in the very form in which it then was, is now before this court. So that we think, *on the record*, we are entitled to an affirmance. But the Legislature, by the act of 1856, ch. 352, sec. 4, (passed on the 10th of March 1856,) repealed the stamp laws of 1844, ch. 280, and 1845, ch. 193, and it is contended by the appellants that they can avail themselves of this repeal at the hearing before this court, and, by reason thereof, are entitled to a reversal of the judgment in this case. To this proposition we oppose an absolute denial, and say that this court cannot so far take judicial notice of the repealing act as to reverse this judgment because of *any* provisions contained therein. The Court of Appeals, as it existed under the old constitution, was prohibited from reversing any judgment on any point or question which did not appear to have been presented to the county court, and on which that court had not rendered judgment. Act of 1825, ch. 117. The constitution of 1851, in art. 4, sec. 2, comes in aid of this limitation of the jurisdiction of this court, by declaring that the Court of Appeals *shall have appellate jurisdiction only*. The law and the constitution together say that this court, having *only* appellate jurisdiction, shall not consider any point or question which was not raised in the court below. Is there any exception to this absolute proposition? None whatever. Whether it would have been wise to provide for the recognition of an alteration either in the relation of the parties, in the history of facts, or in the state of the law, occurring *after judgment* and *after appeal taken*, but *before appeal heard*, is immaterial. No such provision has been made. The Court of Appeals takes jurisdiction of the case, on appeal, as the parties left it at the trial below. They may have failed to present the points which ought to have been presented, and which are obvious on examination of the record. The Court of Appeals cannot remedy their neglect, if the court below was right on the record as it stands. The parties may have entirely overlooked, at the trial below, an

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act of Assembly then existing, and have failed to ask any instruction of the court as to its application to existing facts. Yet though the law on which they might have asked the instruction be within the judicial knowledge of the Court of Appeals, and though, if applied, the judgment would be righteously altered, in the absence of a prayer justifying an application of the law of which the consideration was omitted, the Court of Appeals can no more notice it than if such a law was not on the statute book. If they cannot take judicial notice of a law in existence when the trial below was had, because no question of its application or construction has been raised, whence is derived the right to take judicial notice of a law which, by reason of the date of its passage, was not, and could not have been, made the subject of their limited appellate jurisdiction? The appellants answer, they derive this right from the 5th section of the act of 1856, ch. 352. That section says: "That all bonds that have been drawn previous to the repeal of this act, and have not been stamped, shall be as good and valid as though they had been stamped, and all those debts that have been created, where proper vouchers are shown, shall be as valid in law as though the stamp act had never been passed." Will the Court of Appeals say that this law not only makes such bonds valid, but authorizes them to say that the decision of the court below ought to be reversed, because it rejected testimony which, by the law as it then stood, was certainly inadmissible? We may admit, for the argument's sake, in the broadest sense, that this bond was, after March 10th, 1856, valid without a stamp, and that it was, after that date, sufficient to protect all who had an interest in its execution; but the fact that it had become a valid bond, and one capable of being offered in evidence in behalf of any party interested in it, after the appeal taken, does not make a court in error which, in conformity with the law as it stood when the decision was given, decided the bond to be *then* invalid as evidence. There is no rule of necessity or hardship, it is thought, which can authorize the court to come to any other conclusion than that here insisted on, and the appellees, therefore, think the judgment in this case ought to be affirmed.

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ECCLESTON, J., delivered the opinion of this court.

This suit was instituted in the name of the State for the use of the Mayor and City Council of Baltimore, against Lambert S. Norwood, Elizabeth Smith, Joshua M. Turner, and John W. Watkins, upon the official bond of Norwood, as clerk of the Court of Common Pleas for the city of Baltimore, dated the 29th of June 1853; the penalty of which is fifty thousand dollars. The *act* and the plea are similar to those in the preceding case, between the State for the use of the Mayor and City Council of Baltimore, as plaintiffs below, against L. S. Norwood, E. Smith, and J. M. Turner.

In the case now before us, the record contains an agreement in the following language:

"It is agreed that in this case errors in pleading on both sides be waived, and that either party may give in evidence any testimony which might have been offered in any state of the pleadings. The copy of the bond may be given in evidence without producing the original."

It appears from the record a jury was sworn, and their verdict, as stated, is, "that the defendants do not owe to the said plaintiff the said sum of money, or any part thereof, in manner and form as the said plaintiff hath above alleged." And thereupon the court, on the 12th of December 1854, gave judgment in favor of the defendants; from which this appeal is taken by the plaintiff.

The bill of exceptions shows that, upon the bond being offered in evidence at the trial, the defendants' counsel asked the counsel for the plaintiffs "for what purpose the same was offered, and what breach of said bond it was intended to rely upon in this case, and, on the plaintiffs' counsel refusing to answer that question, or declare on what breach he intended to proceed under said bond, the court sustained the objection of the defendants' counsel as to its being offered in evidence, and the same was ruled out, because the bond, on its face, covering all the duties and liabilities of the defendant, Norwood, as clerk of the Court of Common Pleas, unless it is offered with the intent to prove, under the breaches of it, some default in which the State is directly concerned and interested,

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which intention is repelled by its being sued on for the use of the Mayor and City Council of Baltimore, it is inadmissible in evidence under the act of 1844, ch. 280, and 1845, ch. 193, it further not appearing to the court, for want of breaches assigned in the pleadings, for what purpose the bond is offered in evidence." To this ruling of the court, and refusal to admit the bond to be read in evidence, the plaintiffs excepted.

In *Laurenson vs. The State, &c.*, 7 H. & J., 339, in a suit upon a bond with a collateral condition, no breaches were assigned, but there was an agreement similar, in most respects, to the one in the present case. The court considered that a waiver of errors in pleading, and as dispensing with an assignment of breaches in the regular mode. In delivering the opinion of the court, and whilst speaking of such a practice, the late Judge Martin called it "a very loose course of proceeding," and we think he gave it an appropriate name. The authority of that case, however, requires us to hold in this, that under the agreement there was no need of suggesting breaches in the pleadings, or upon the roll. And we must also say, that the refusal of the counsel for the equitable plaintiffs to state what breach of the bond he intended to rely upon, when he was asked to do so, could not justify the court in refusing to admit that instrument to be read in evidence. If it had been admitted, it would still have been necessary for the equitable plaintiffs to show, by proof, that they had some valid claim for which the bond was responsible.

A further objection to the admissibility of the bond, mentioned by the court and insisted upon by the defendants' counsel, is, that it was not stamped, as required by the laws existing at its date. The acts alluded to, were passed for the purpose of raising revenue for the State. They did not design or profess to confer upon the citizens of the State, or others, any private benefits or rights, but operated to impose burdens upon them for State purposes. The Legislature, therefore, had full authority to remove such burdens at any time, by repealing those laws, and this was done by the act of 1856, ch. 352, secs. 4 and 5. The latter of these sections provides, "That all bills, notes or bonds that have been drawn previous to the

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repeal of this act, and have not been stamped, shall be as good and valid as though they had been stamped, and all debts that have been created, where the proper vouchers are shown, shall be as valid in law as though the stamp act had never been passed."

But for the decision below, it cannot be doubted that this repealing law would remove all objection to the bond for want of a stamp. Although the law, in this view of it, would be retroactive in its operation, still that could not prevent its having such an effect. It is true, as a general rule, that when the interpretation of a statute is doubtful, in respect to pre-existing contracts, it will be construed as operating prospectively. But when the language of the statute clearly indicates an intention that it shall have a retroactive effect, it must be so applied. *Baugher, et al., vs. Nelson*, 9 Gill, 303. See, also, *Reynolds vs. Furlong*, 10 Md. Rep., 321.

After the decision in *Atwell vs. Grant*, 11 Md. Rep., 104, with reference to the act of 1856, we must reverse the decision in this case, so far as regards the refusal of the court to admit the bond in evidence because it was not stamped. And such a reversal we consider proper, although the stamp laws were not repealed until subsequently to the decision below.

In the case of *United States vs. Schooner Peggy*, 1 Cranch, 110, Ch. J. Marshall says: "It is, in the general, true that the province of an appellate court is only to enquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes, and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will, and ought to, struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest im-

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port; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

The principle thus announced requires a reversal of the decision upon the question now under consideration. The act of 1856, in this connection, is merely an abandonment or surrender of the rights of the State. It does not impose upon the parties any obligations which the terms of the contract were not, in good faith, designed to create, and to insure the performance of. The law only permits the contract executed by the defendants to be used in evidence, which use had been prohibited for the purpose of securing the payment of a tax to the State, the failure to pay which has been released by the State, and the law releasing the tax declares that the contract shall be as valid in law as if the act creating the tax had never been passed.

In the previous case of the present term, to which reference has been made, it has been said there was no necessity to obtain authority from the State to institute that suit, and, of course, the same law will apply to this.

*Judgment reversed and procedendo ordered.*

(Decided June 24th, 1858.)

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## HEIRS AND TERRE-TENANTS OF SAMUEL MILLER, vs. THE STATE, use of LEWIS FIERY.

An act of Assembly was passed, authorising a county court to grant an appeal to the plaintiff, in a case in which the judgment was in favor of the defendant, and to incorporate into the record the same exceptions which had been taken in another and similar case, tried in the same court, an appeal in which was then pending. The exceptions were accordingly

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signed, and the case prepared for the Court of Appeals, but before the record was sent up, the *other case* was reversed and sent back under *procedendo*, and tried again and new exceptions taken. An agreement was then made by the parties to *reinstate the first case*, in order that these new questions might be raised in this case also, and it was "agreed, that if the proceedings of the county court in signing the exceptions, should be deemed by the Court of Appeals void, by reason of the unconstitutionality of the act of Assembly by which they were authorized to be signed, then the appeal in said case shall be dismissed, otherwise it shall be heard and determined on the questions of law raised in the other case." The case was reinstated and a verdict and judgment rendered for the plaintiff, and the defendant appealed, and the record with the above agreement sent to the Court of Appeals, which decided the act unconstitutional and dismissed the appeal. The plaintiff then attempted to enforce the last judgment in his favor by *scire facias*, insisting that the *dismissal of the appeal* left that judgment in full force. This attempt the defendant resisted, both by plea to the *sci. fac.*, and by motion to strike out the judgment, insisting, that by the above agreement the judgment was to be *void*, if the act of Assembly was declared unconstitutional, HELD:

That this defence was not the subject matter of a plea *at law* to the *scire facias*, but that the defendant is entitled to relief against the judgment *in equity*, the design of the *agreement* being, to prevent the plaintiff from proceeding on his judgment, if the act of Assembly was declared unconstitutional.

#### APPEAL from the Circuit Court for Washington county.

These two appeals argued and decided together were taken by the appellants, the *first*, from the refusal of the court below on *motion to strike out a judgment* against Samuel Miller, and the *second*, from the *fiat* upon a *scire facias* sued out by the appellee to revive the *same judgment*.

*1st. Appeal.* To the November term 1841, of Washington county court, *two suits* were brought in the name of the State, for the use of Henry Fiery and Lewis Fiery, respectively, against Samuel Miller. Both suits were on the same guardian's bond as the cause of action, Miller being the surety therein of the father, and guardian of Henry and Lewis Fiery. The defendant pleaded *non est factum*, in each case, and trials took place in *both* at November term 1843. The case of Henry was first tried, and certain questions of law decided by the court against him, to which exceptions were taken at the time. After the jury retired in Henry's case, that of Lewis was taken up, and the same questions of law arising, were de-

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cided by the court in the same manner, but no exceptions were taken by Lewis, his counsel, as is alleged, being under the impression that no objection would be made to taking them when the cause was finally decided; in other words, that one case would abide the result of the other.

In the case of Lewis, the jury returned a *verdict for the defendant*, and the plaintiff moved for a new trial. In that of Henry, the jury being unable to agree were discharged. Both cases were then continued; Henry's as it originally stood on the docket, and Lewis' under motion for a new trial, till November term 1844, when Henry's case was again tried, the same points arose, were decided and exceptions taken thereto, as at the former trial, and at the same term the court overruled the motion for a new trial in the case of Lewis, and rendered *judgment for the defendant*. In Henry's case the exceptions were signed without objection, and the record transmitted to the Court of Appeals, but in the case of Lewis, upon application to have similar exceptions signed to those in the case of Henry, the defendant's counsel objected and the court refused to interfere. Lewis being thus unable to get his case to the Court of Appeals, applied to the Legislature for relief, and the act of 1845, ch. 358, was passed, the provisions of which are fully stated in the opinion of *Judge Eccleston* in this case.

After the passage of this act a rule was laid on the defendant, to show cause why its provisions should not be carried into effect. The defendant showed cause, insisting, among other reasons, that the act was unconstitutional, and various affidavits as to what transpired at the trial of the cause, were taken and filed on both sides, and the court at November term 1846, made the rule absolute, and in compliance with the provisions of the act, signed and sealed bills of exception, similar to those in the case of Henry, "the court being of opinion from the affidavits filed in the case, that the points of law decided and the instructions given, in the case of the State of Maryland use of Henry Fiery, against Samuel Miller, are substantially the same with those decided in the case of the State of Maryland, use of Lewis Fiery, against Samuel Miller, and that the plaintiff lost his right to appeal, at the proper time for taking the

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same by a misunderstanding of the counsel engaged in the case," and directed the case *thus prepared* to be sent to the Court of Appeals.

In the mean time, the appeal in Henry's case had been decided by the appellate court, (3 *Gill*, 335,) the judgment *reversed*, the case sent back under a *procedendo*, and tried *de novo* at November term 1847, at which trial new points were raised and decided by the court, and exceptions taken by the defendant, and the verdict and judgment being in *favor of the plaintiff*, the defendant appealed. At the same term, (November term 1847,) the record in the case of Lewis, *prepared as above stated*, not having been transmitted to the Court of Appeals, an *agreement* was made by the counsel of the parties and filed in the case, which after *reciting* that bills of exception had been signed and sealed by the court in accordance with the act of 1845, ch. 358, and setting out the same in full, proceeds thus:

"And whereas, after said bills of exception were thus signed by the court, it was agreed by the counsel for plaintiff and defendant in the above cause to *reinstate* said cause upon the docket, in order that the new points and questions of law, which might arise in the similar case of the State, use of Henry Fiery, against the said Samuel Miller, which had previously been sent down from the Court of Appeals upon *procedendo*, might also be raised and decided in the case now in question, wherein the State, use of Lewis Fiery, is plaintiff, and the said Miller defendant, and accordingly said cause *was so reinstated*, and stands No. 51 trials, November term 1847, of Washington county court, for trial as aforesaid. It is therefore *agreed* between the counsel for the parties to said suit, that if the proceedings of Washington county court, in signing and sealing the bills of exceptions herein set forth, shall be deemed by the Court of Appeals of Maryland *void, in consequence of the unconstitutionality* of the act of Assembly by which said bills of exception were authorised and directed to be signed and sealed by Washington county court as aforesaid, *then the appeal in said cause shall be dismissed*, otherwise it shall be heard and determined upon the questions of law, which are to be raised

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and decided at the trial of the cause, at the present term of Washington county court, and which are similar to the questions presented in the case of the State, use of Henry Fiery, vs. the said Samuel Miller: And it is further agreed, that this case shall abide the result or decision of the Court of Appeals, in the case of the State, use of Henry Fiery, vs. Samuel Miller, upon the bill of exceptions of the defendant, in which last mentioned case an appeal has been taken at the present term of this court."

The cause being thus *reinstated*, was, as the record shows, regularly tried before a jury, at November term 1847 of Washington county court, and a *verdict and judgment* rendered *in favor of the plaintiff*, for \$1484.88. From this *judgment* the *defendant appealed*, and the case *with the exceptions and agreement* above stated, was sent to the Court of Appeals, and at its December term 1849, that court decided, that the act of 1845, ch. 358, was *unconstitutional*, and *dismissed the appeal*, remarking that "the *agreement* of the counsel in the cause, requires nothing more of this court than the expression of its opinion on the constitutionality of the act of Assembly," (8 *Gill*, 145,) and at the same term *affirmed the judgment* on the appeal in the case of Henry Fiery, (8 *Gill*, 141.)

Afterwards, on the 17th of September 1852, the plaintiff Lewis Fiery, issued a *scire facias* against the heirs and terre-tenants of the defendant Samuel Miller, (who had in the mean time died,) to revive the *judgment of November term 1847*, insisting, that by the *dismissal of the appeal* of the defendant from that judgment, the same was left in full force and effect. To this writ the heirs and terre-tenants appeared and filed *pleas*, and then moved the court for a rule upon the plaintiff, to show cause why said judgment should not be *stricken out, vacated or entered satisfied*, alleging in their petition for the rule, that by the *agreement* of counsel above set forth, and the distinct understanding of the parties thereto, it was agreed, that if the act of Assembly therein referred to, should be considered void by the Court of Appeals, then the appeal in the case should be dismissed, and the bills of exception signed by Washington county court, by virtue thereof, and *all the pro-*

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*ceedings of said court under said act, and with a view to carry the same into effect, should be deemed and considered utterly null and void, and that the judgment entered for the purpose of reinstating said cause under said agreement, was one of the proceedings of said court, in carrying into effect said act of Assembly, and which, if the said act should be declared unconstitutional by the Court of Appeals, was, by the said agreement, to be considered null and void, and that said Lewis Fiery, in violation and fraud of this agreement, has issued a scire facias on said judgment.*

The plaintiff showed cause, insisting, among other things, that said judgment by virtue of the dismissal of the appeal aforesaid, now stands in full force, and is unreversed, and in no manner vacated or annulled by any proceeding of the Court of Appeals, and that it is not affected or annulled by the construction and legal operation of the aforesaid agreement; that the trial, verdict and judgment at November term 1847, were not had in pursuance of the act of 1845, ch. 358, nor were they necessary to accomplish the objects and purposes of that act; and that by said agreement it was provided, that the case of Lewis Fiery *should abide the decision and result* of the case of Henry Fiery, upon exceptions then taken in the trial of said last mentioned case under the *procedendo*, and said cause having been *affirmed* by the Court of Appeals, the case of Lewis Fiery is to stand and be enforced as if the *judgment therein* had also been *affirmed*.

The court, (*Perry J.*,) refused to allow the motion or to vacate the judgment, and from this decision the defendants appealed.

*2nd. Appeal.* The *scire facias* having been issued as above stated, returnable at November term 1852, was duly returned served, and the defendants, at March term 1853, filed several pleas thereto, relying substantially upon the defences which they subsequently relied upon in their motion to *strike out*. At the following July term, the plaintiff moved the court to set aside these pleas, upon the grounds that being pleas *in abatement*, they were not filed by the rule day, and were defective for duplicity, and were not verified by affidavit, and also moved

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the court to render judgment in default of a plea. The court after argument, ordered the pleas to be set aside, but refused the motion to enter judgment by default. The defendants then moved for leave to amend their pleas, which was granted. To this refusal to enter judgment, and to the granting of the leave to amend, the plaintiff *excepted*.

The defendants then, in accordance with the leave to amend, filed two pleas, one of *nul tiel record*, upon which issue was joined by the plaintiff, and the other a special plea in bar, setting out and relying upon the defences heretofore stated. To this latter plea the plaintiff filed a *special demurrer*, upon the ground, 1st, that it does not fully and specially set forth the record and matters of record, upon which it purports to be founded; 2nd, because it concludes with a verification *to the country*, whereas it should have concluded with a verification *by the record*, all matters alleged and stated therein, being matters of record and provable by the record only; and 3rd, because it does not allege and set forth the matters and things therein contained with sufficient certainty.

The issue upon the plea of *nul tiel record*, was decided by the court in favor of the plaintiff, and the court also sustained the demurrer to the second plea, and gave judgment of *fiat* upon the *scire facias*. From this judgment the defendants appealed.

The cause was first argued before LE GRAND, C. J., ECLESTON and TUCK, J.; and upon motion of the appellee a re-argument was ordered and had before LE GRAND, C. J., ECLESTON, TUCK and BARTOL, J.

*Wm. Price* for the appellants:

The facts are, a suit was brought against Samuel Miller on a guardian's bond. It was tried at November term 1843, and verdict *for defendant*. A motion was made for a new trial, which was overruled at November term 1844, and *judgment* on the verdict. In this suit there were no bills of exception, and the case *as it stood* was finally settled in favor of the defendant. But another suit was tried against Miller upon the

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same bond, in which trial there were bills of exception and points reserved. These points were decided in favor of the plaintiff, in the Court of Appeals. It was natural that Lewis Fiery, who lost his suit for want of bills of exception, should be desirous of introducing stale exceptions into his case. This was accomplished by means of an act of Assembly. This act does not say that Washington county court shall grant Lewis Fiery a new trial, but requires the court to grant him an appeal, and, that he may have something to go upon in the Court of Appeals, requires the court below to introduce into his case the same bills of exception which had been taken in the other case alluded to. The court below, supposing the act to be constitutional, obeyed it, and out of this act, and this view of it by that court, all the difficulties in the case have arisen.

The proceedings under this act resulted in a judgment against Samuel Miller, at November term 1847 of Washington county court, and the object of these proceedings and of the judgment, was to test the constitutional validity of the act of Assembly. If the law was constitutional, the object was to let the judgment stand and abide the event of the other suit. If the law was unconstitutional, the object was to dismiss the appeal and the whole proceeding to be considered void. The proceedings and the judgment were under an *agreement* entered into by the parties, and signed by their counsel. It was a judgment therefore *upon terms*, and the terms are set out in the agreement. By reference to the petition to strike out, and the plea to the *sci. fa.*, which is demurred to, and therefore *admitted*, it will be found that the whole case is admitted. It is thus admitted, that the whole controversy was to depend upon the constitutional validity of the act of Assembly; that if the act was void the judgment was to be void; that the act was declared unconstitutional by the Court of Appeals; that if the act should be void all the proceedings had with a view to carry the act into effect should be void also; and that the judgment was one of *such* proceedings; that if the act should be declared void the appeal should be dismissed, and when dismissed all the proceedings below, including the judgment, should be null and void, and that the appeal was dismissed according to the agreement of the parties.

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The question is, what is the power of the court in such a case? If a judgment is confessed by agreement of parties upon terms filed, has the court power to hold the parties to the performance of the terms? The act of 1787, ch. 9, sec. 6, has no application to a question like this. That act provides, that where a judgment shall be set aside for fraud, deceit, surprise or irregularity *in obtaining the same*, the court may direct continuances to be entered from the term when the judgment was rendered to that at which it shall be set aside. It is not pretended there was any fraud or deceit *in obtaining* this judgment; on the contrary, it was entered by consent and was just what it was intended to be. By the terms agreed upon, and filed, it was to be a valid binding judgment, if the act of Assembly proved to be constitutional, and a void judgment, if the act proved to be unconstitutional. It has turned out that the act was unconstitutional and the judgment therefore became void. Has the court power to declare it void, or is the court compelled to enforce it knowing it to be void? It must not be overlooked, that in contemplation of law, the entry of this judgment was *the act of the court*; the settlement of the terms upon which it was entered was *the act of the court*. Has the court, therefore, power to enter a judgment upon terms, and no power to see the terms performed? Of the power of the court to enter a judgment upon terms there is no doubt. The power to see those terms carried out in good faith, belongs to the *general equitable jurisdiction of courts of law*.

*Kerr on Actions at Law*, 29, in 81 *Law Lib.*, derives the equitable jurisdiction of courts of law from two sources, 1st, from the statutes of jeofails, and 2nd, from the inherent authorities which every court possesses over its own proceedings. This case is within the *second* branch of this jurisdiction as thus described by Mr. Kerr, which, he says is necessarily more flexible than the authority to amend the proceedings conferred by statute. It suits itself to the ever varying circumstances presented in different suits, and to explain its *nature* he mentions a few of the circumstances in which it is exercised. (*Kerr on Actions at Law*, 34.) "In short," says this writer, "where the courts perceive that justice requires the interference

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of a court of equity, and that a court of equity would interfere in every such case, in order to save the parties the expense of proceeding to a court of equity, they will give the parties the aid of their equitable jurisdiction, to enable them to effect the same purpose." *Kerr*, 36, citing, *Phillips vs. Clagett*, 11 *Mees. & Wels.*, 84, which fully supports the doctrine of the text. It is said by *Holt, C. J.*, in 1 *Salk.*, 400, that "where a judgment is confessed upon terms, it being in effect but a conditional judgment, *the court will lay their hands upon it and see the terms performed*. But where a judgment is acknowledged absolutely, and a subsequent agreement made, this does in no way affect the judgment and the court will take no notice of it, but put the party to his action on the agreement." The doctrine of *Holt* would, no doubt, be considered sound and sensible, according to the notion concerning the powers of courts which prevailed in his day. And if a judgment were confessed, which at the time was intended to be absolute, but which, from circumstances arising afterwards, the parties agreed to convert into a conditional judgment, and the party should in violation of such agreement and against good faith, attempt to enforce the judgment, there is but little doubt that the court, in *Lord Holt's* time, would refuse to interfere and put the injured party to his action on the agreement. In such a case the judgment would be the act of the court, the agreement making it conditional, the act of the parties *in pais*; and according to the strict rules which then prevailed, it would be held, that a matter of record could not be controlled by a proceeding *in pais*. But at the present day, it is not to be supposed that the court would allow its process to be used against good faith. If a defendant, for instance, should pay the judgment debt in full, and the plaintiff should afterwards attempt to enforce the judgment by execution, would not the court lay their hands upon the case and prevent the fraud? In such a case the old remedy was by *audita querela*, a proceeding by which a defence arising after verdict and judgment is made available to the defendant, (*Kerr*, 307.) The nature of an *audita querela*, is well explained in *Giles vs. Hutt*, 1 *Wels. Huls. & Gor.*, 701, where it is said, that an *audita querela*

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lies to avoid execution of a judgment, because after the judgment the defendant had paid the entire sum, for an *audita querela* "is not only a *suit at law* but *in equity also*." But the indulgence now shown by the courts in granting summary relief, upon motion, in cases of such evident oppression, has almost rendered useless the writ of *audita querela*, and driven it quite out of practice, (*Kerr*, 307.) It is in exercise of its equitable jurisdiction that a court of law will set off one judgment against another, upon application, after both judgments have been rendered. This is a power incidental to courts of equity, and has been long exercised by them exclusively; for it is only within a few years that courts of law have undertaken to set off one judgment against another; *per Spencer J.*; 14 *Johns.*, 75, *Simson vs. Hart. Magruder, J.*, in *Annan vs. Houck*, 4 *Gill*, 333, says, that courts of law have always exercised this power. It is an incident, it is said, to the power which courts have over their suitors. The power which a court exercises over its suitors, can only be in compelling them to act justly, and especially in restraining them from making a fraudulent use of the process or proceedings of the court. But the ground upon which we seek to set aside this judgment, is not for any defence occurring after the entry of the judgment, but by reason of a condition annexed to it at the time of its rendition. This judgment was the act of the court, the terms were annexed to it by the court, and the parties must look to the court to carry out its own terms. The court would enforce the terms and vacate the judgment, even if the plaintiff had made no attempt to violate the agreement, much more will the court interfere where the party is actually proceeding, against good faith, to compel payment of a judgment which he knows is void. (*Kerr*, 38.) The interference of the court is *ex debito justitiae*. 3 *Chitt. Gen. Pr.*, 75.

As to the facts of the case: The court, as I am informed, have found some difficulty in ascertaining from the record, whether the judgment at November term 1847, was confessed, in pursuance of the agreement. Some difficulty is said to arise from the fact, that a jury was empanelled and a verdict

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taken under the direction of the court. The true history of the matter is simply this, that after the agreement was signed and filed, the court took the case into its own hands, and had a jury empanelled, as the best way of introducing the bills of exception, which they copied from the other case as directed by the act of Assembly. The court also directed that a verdict should be rendered, so that, as the case in the event of the act being constitutional, was to abide the event of the other suit, the amount of the judgment might be truly ascertained, and nothing left open for dispute thereafter; all this was the proceeding of the court to which the counsel gave his assent. The course of proceeding adopted by the court, has introduced some little confusion into the record, but the penalty of the irregularity should not be visited upon the party. There can be no doubt, however, that the judgment and the appeal from it, were in pursuance of the agreement. It was under the agreement that the constitutionality of the act was tested before the Court of Appeals. It was under the agreement that the decision of the court below was reversed, and still the appeal dismissed, as is manifest from the concluding sentence of the court's opinion, in 8 *Gill*, 150, and in the record in that case the agreement is set out. It was not denied *then* that the judgment was under and by virtue of the agreement. But for the agreement the decision would have been reversed and the judgment below annulled. And it would be hard, that the defendant should be deprived of his reversal in that case because of the agreement, and the judgment be given against him in this because there was no agreement.

The question may be asked, why the appeal should be *dismissed* in case the act was unconstitutional, instead of the judgment reversed, which would be the natural course? The answer is, that it is difficult now to say what the reason for this stipulation was. The agreement was drawn by the counsel for the plaintiff, and the arrangement made upon his suggestion. The agreement provides for two contingencies, the one that the act should prove constitutional, and the other that it should prove unconstitutional. If constitutional the case was to remain in the Court of Appeals, where it should be

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heard and determined on the questions of law raised in the other case, and it might, therefore, naturally occur to the draftsman of the agreement, that it should be dismissed if the act were unconstitutional. But, whatever may have been his reasons, one thing is certain, that it was not the intention of the parties that the judgment below should be binding upon the defendant, if the foundation of the judgment should be taken from under it. The agreement is imperfect, in not specifying more particularly what proceedings were to be had in the court below should the act be unconstitutional. But it recognises two things as true, if the act should be declared unconstitutional; 1st, that the act was void; and 2nd, that the proceeding of the county court under it was void. It recognises moreover the *dismissal of the appeal*, as the sign and token that the act was void and all the proceedings under it void, and the amount of the whole is, that if the *appeal* was *dismissed* under the agreement the case should stop and go no further. If the counsel had been asked: "Do you intend if the Court of Appeals pronounce the act and the proceedings of the court below all void, to proceed upon the judgment as binding upon the defendant? he would have considered the question as intimating a doubt of his fairness and regarded it as offensive.

The court in this case however, sit as a court of equity, and will look at the substance of the case: and if it is satisfied that this is a fraudulent attempt by this plaintiff to enforce a void judgment against the defendant, and more than all to make the court instrumental in the perpetration of the fraud, the court will lay their hands upon the proceeding and put a stop to it. The court will not be led away from the great purpose of vindicating its own honor, by any little technical objection of the party. The question is, is the court satisfied of the facts of the case? And it will look at the facts in the same liberal view as if sitting in equity. 11 *Mess. & Wels.*, 89, *Phillips vs. Clagett*. 23 *Eng. C. L. Rep.*, 221, *Martin vs. Martin*. Again, the plea to the *sci. fa.* contains this averment: "By virtue of which said decision of the Court of Appeals, and by force of the said agreement between the parties,

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in conformity with which the said appeal was dismissed, the said judgment, at November term 1847 of Washington county court, being the same mentioned in the said writ of *sci. fac.*, became and was rescinded, annulled and made utterly void, and of no effect." And this plea is demurred to, and therefore the effect of the agreement so averred is admitted.

It appears to me that the proper course will be, to strike out the judgment upon the application to the court for that purpose, and then the *scire facias* falls of course, there being no judgment to support it.

*R. H. Aloey* for the appellee:

Inasmuch as there had been an appeal prosecuted from the original judgment of November term 1847, which was asked to be stricken out, and the time elapsed within which an appeal could be taken from such judgment, this appeal being from the refusal of the court to strike out this judgment, will not lie, and ought therefore to be dismissed. 12 G. & J., 353, *Washington vs. Hodgskin*. 9 Gill, 242, *Cushwa vs. Cushtwa*. 6 H. & J., 151, *Hawkins vs. Jackson*. But if the appeal does lie it is then insisted:

1st. That there being a regular verdict of a jury and a judgment thereon for the plaintiff, every intendment and presumption must be indulged in their favor, and according to well established principles, a solemn judgment will not be readily or lightly interfered with. 2 H. & J., 41, *McMechen vs. Mayor & C. C. of Balto.* 2 H. & G. 374, *Munnikuy-sen vs. Dorsett*. The trial at November term 1847, when the original judgment was obtained, was not had in pursuance of the act of 1845, ch. 358, and of consequence, the appeal from that judgment was not taken in pursuance of that act. The act did not direct or authorise a new trial, but only the signing and sealing of bills of exception, similar to those in the case of Henry Fiery, and the court, after taking the preliminary proceedings, at the previous term, had complied with the directions of the law by signing and sealing the exceptions. It was by agreement, independent of the act of Assembly, that a new trial was had, and by agreeing to such new trial the defend-

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ant waived and abandoned all the benefits and advantages which he might have taken from the previous verdict and judgment in his favor. The new trial not being had in pursuance of the act, and the appeal actually taken not being from the judgment contemplated by the act, which was a judgment in favor of the defendant, but from a totally different judgment, and one rendered subsequent to the passage of the act, the constitutionality or unconstitutionality of that law had, in fact, nothing to do with the validity or legality of the judgment from which the appeal was taken. The constitutional question, in regard to the act, was referred to the Court of Appeals by agreement, and without regard to any legal objection to the judgment from which the appeal was taken. The Court of Appeals having, in pursuance of the agreement, dismissed the appeal, of course the judgment was left standing in the court below unaffected by the appeal, and as a legal, subsisting, efficient judgment. Upon the dismissal of the appeal the case was left to abide the result of the case of Henry Fiery, which was, at the same term of the appellate court, decided in favor of the plaintiff.

2nd. After all the proceedings which were had upon the judgment of 1847, and of which the defendants were cognizant, and after the long time which has elapsed before the motion to strike out was made, the defendants must be taken as having acquiesced in the regularity of the judgment, and as having waived all ground of objection for which relief could have been had if the motion had been made in due time, and they ought not now to be permitted to question the judgment upon any such ground. 2 Arch. Pr., 225, 226. 1 Dow. & Ry., 181, *Sloman vs. Gregory*. Andrews, 296, *Keate, et al., vs. Watson*. 1 Salk., 402.

3rd. The judgment, but not the verdict of the jury, remained under the control of the court, and subject to alteration and amendment, and even to entire change during the term at which it was rendered; but after the term elapsed and the judgment became enrolled of record, then the solemn and conclusive nature of the record restrained all interference with it, (*Coke Litt.*, 260,) and the court could only set aside or strike

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it out for fraud, deceit, surprise or irregularity, in the *obtentio* and *rendition* of it. (*Act of 1787, ch. 9, sec. 6.*) There is no allegation or pretence there was either fraud, deceit, surprise or irregularity, in the obtention or rendition of this judgment, but the complaint is, that issuing the *scire facias* thereon is a fraud and surprise upon the defendants.

4th. The defendants having appeared to the *sci. fa.*, taken various proceedings, and *pledged* as a bar and full defence thereto, all the facts specially set forth in their application for the rule to strike out, the *sci. fa.* with this defence to it being still pending in court at the time of such application, it is insisted they could not prosecute two such modes of defence, at the same time, in order to defeat the judgment. The pendency of the *sci. fa.* and of this plea to it in bar, was sufficient reason of itself for refusing to make the rule absolute. *2 H. & G., 374, Munnikuyseen vs. Dorsett.*

5th. Whatever interpretation may be placed on the agreement of the 10th of December 1847, as it was entered into before the trial and judgment, it cannot be made to operate a defeasance of the judgment. The judgment being of the higher nature cannot be controlled or rendered nugatory by the agreement, nor would the court permit the integrity and the solemn and conclusive verity of their judicial proceedings to be controlled, and destroyed, by agreements of parties made previous to invoking judicial action. To sanction such a practice would be to render our courts tribunals for the trial and decision of mere experimental abstract propositions, without reference to the legal consequences to the parties or the rights established or obligations imposed, which always follow the registration of solemn judicial judgments. *Cro. Eliz., 837, Gage vs. Shurland.*

6th. By agreeing to reinstate the case on the docket, and to the new trial which took place at November term 1847, the defendant clearly waived and renounced all benefit and advantage of the verdict and judgment previously rendered in his favor, and upon reinstating the case, the former verdict and judgment became vacated and were thereby rendered nullities. By the agreement and reinstating the case on the docket for

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retrial, the whole case was again opened as if no trial had taken place. Now, if the court should think that this judgment of 1847 should be stricken out and set aside, then it will be necessary that the case be brought up on the docket of the court below by regular continuances, and it will then stand for trial again. *Act of 1787, ch. 9, sec. 6. 2 H. & G., 374.*

7th. And lastly, this being an application to the equitable powers of the court, the plaintiff insists, that having originally lost his just claim against the defendant by reason of a mistake or accident, if by reason of another mistake or accident his rights are restored to him, and he is placed where he would have been but for the original mistake or accident, upon no principle of equity or justice can the court be required to correct the one without at the same time correcting the other, and placing both parties where they originally stood before the occurrence of either. Upon principles of law, the mistake or accident cannot be relieved against, and if the equity powers of the court are invoked, then justice as well as principle would require the defendants to correct the first or original mistake or accident whereby the right of appeal was lost, before they ask to have the second or last mistake corrected. *1 Story's Eq., secs. 64, c. 64, e, 106. 8 Md. Rep., 427, Anderson vs. Tydings.* All the circumstances surrounding the case show an equitable and moral consideration for making such an agreement as that of the 10th of December 1847, and that its true construction is that given to it by the appellee.

As to the appeal in the *scire facias* case: The judgment of the court below upon the plea of *nul tiel record*, is not before this court for review, as the defendants took *no exceptions* upon the trial of that issue. *1 H. & J., 463, Dorsey vs. Whetcroft. 3 G. & J., 24, Ayres vs. Kain.* The demurrer to the second plea was special, but it performs the office of a general demur-  
rer also. *10 G. & J., 334, Brown vs. Jones.* This second plea, when tested by a special demur-  
rer, is wholly insufficient in form. All the matters set forth in it are matters of record, the act of Assembly included. This being so all such matters should have been referred to by the *prout patet per recordum*,

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and the omission to do so is fatal. There could be no issue framed on this plea triable by jury, all the matters being of record, and therefore, the offer to verify should have been by the record, and the omission thus to conclude this plea is fatal to it. *Com. Dig. Pleader, (E.,) 29. 4 G. & J., 353, Shafer vs. Stonebraker.* But however the question of form may be disposed of, the plea when tried on general demurrer forms no bar to this *scire facias*. Before it can be regarded as a bar, it must be adjudged to contain a substantial and conclusive answer to the action, (2 G. & J., 430, *Karthaus vs. Owings,*) and the question is what is admissible or what can be well pleaded as a bar to this *sci. fa.*, because the demurrer only confesses, for the sake of the legal issue, matters of fact well pleaded, (*Com. Dig. Pleader, (Q.,) 5, (Q.,) 6, Coke Litt., 72, A.,*) and not such as are immaterial, repugnant or improper. 1 *East.,* 634, *Nowlan vs. Geddes.* The plea in question sets up matters antecedent to the judgment recited in the *scire facias*, as an answer to the writ. It seeks, in fact, to have the whole proceedings upon which the original judgment is based, re-opened and reviewed by this court, and the judgment reversed or vacated. It allows to the judgment recited in the writ, no sort of sanctity or verity whatever, notwithstanding it is a solemn judgment of record rendered by a court of competent jurisdiction and authority. Those matters which, in legal contemplation, are merged in the original judgment, are attempted to be made matters of defence to this action. Can it be done? I contend it cannot upon any principle known to the law. The proceedings upon which the judgment was rendered, and the judgment itself, are beyond question or dispute on *scire facias*. Every thing antecedent and relating to the original judgment are concluded by it, and the only way in which the judgment could have been reviewed and corrected for error in it, was by an appeal or writ of error prosecuted therefrom. There is no maxim of the law of greater universality, or to which the courts have adhered with greater perseverance and more general benefit, than that *res judicatae pro veritate accipiuntur.* Parties are never permitted to question or to aver against the verity of the record..

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*Coke Litt.*, 260. 2 *Barn. & Adol.*, 362, *King vs. Carlile*. And there is no case where this general principle is more directly applicable than in the case of a *scire facias*, where the defence thereto involves the existence and legality of the judgment upon which the writ issues. And so we find it laid down in books of the highest authority, that no matter can be pleaded to a *scire facias*, contrary to the title upon which the original recovery was obtained, nor which proves the original judgment erroneous and voidable. 2 *Inst.*, 470. 5 *Sergt. & Rawle*, 65, 68, *Cardesa vs. Humes*. As to the manner in which a record is to be treated in pleading, and the solemnity with which it is to be regarded. *Chitty on Pleading*, 370, (10 Amer. Ed.,) says: "The validity of these (records,) cannot, in general, in pleading, be impeached or affected by any supposed defect or illegality in the consideration or transaction on which they were founded; nor can there be any allegation against the validity of a record except by a writ of error, and consequently, it is not necessary to state the circumstances or consideration on which the record was founded." See also *Green vs. Ovington*, 16 *Johns.*, 55. This plea seeks to do the very thing which these authorities say cannot be done. The principle sustained by the authorities just cited, has been sanctioned and applied to a considerable extent by this court, in *Kemp vs. Cook*, 6 *Md. Rep.*, 305, and *Moore vs. Garretson*, *Ibid.*, 444. See also 3 *How.*, 57, *Dickson vs. Wilkinson*. If I am right in the position, that all matter existing before the judgment was merged in it, and that no matter can be pleaded to this *scire facias* as a bar to it, that had an existence antecedent to the recovery of the original judgment, then all other considerations which might arise under this plea are excluded; and feeling confident that I am right in so insisting, I submit the case.

**LE GRAND, C. J.**—My opinion is, the motion ought to have prevailed. When the case was originally tried, in Washington county court, the judgment was in favor of the defendant, Miller. There being no exceptions, that judgment was a conclusive bar to the claim of the plaintiff. In

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this state of case, application was made to the Legislature for its interference, and, in pursuance of the request, the act of Assembly was passed. It authorized the opening of the case, and the incorporation into its record of exceptions which had been taken in another case, and upon the validity of which the Court of Appeals had pronounced. By agreement of counsel, the judgment which had been entered in this case, in favor of the defendant, was stricken out, and one entered in favor of the plaintiff, the agreement providing, that if the Court of Appeals should declare the act of Assembly constitutional, then the substituted judgment should remain in full force, but if it should be of opinion that the act was unconstitutional, then the appeal was to be dismissed. The court held the act to be unconstitutional, and, in conformity with the agreement, dismissed the appeal. This left the judgment against the defendant in full force. To cause it to be stricken out, and to restore the record to its original condition, is the object of the motion which has been made by the appellant.

The act of Assembly authorizes the court to strike out a judgment which has been entered because of fraud, accident or mistake. This, in my judgment, is a clear case of mistake. The agreement did not clearly, or rather did not as fully as it should have done, express the real intention and purpose of the parties. To give to it the construction contended for on behalf of the appellee, is, in my opinion, to stultify the parties to it. To my mind, it is perfectly clear that it was the purpose of the parties to have submitted to the Court of Appeals the question of the constitutionality of the act of Assembly, and upon the decision of that question was to rest the decision of the case; that is to say, if the law should be pronounced constitutional, then the judgment in favor of the plaintiff was to stand, but if it should be pronounced unconstitutional, then the appeal was to be dismissed, and the judgment reversed. The whole difficulty in the case, as it now stands, grows out of the omission of the agreement to confer, *in words*, upon the Court of Appeals (if they should be of opinion the law was unconstitutional) *the right to reverse the judgment*. But

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that it was the understanding of the parties that it did confer this power, I have no doubt. Otherwise, the agreement is all one-sided, for, in *any event*, the defendant was to be defeated. *If the law was constitutional, he was to be bound, and also was he to be bound if it should be unconstitutional.* This is the substance of the construction placed on the agreement on the part of the appellee. It is impossible for me to bring my mind to the belief that it ever was the intention of the appellant to enter into an agreement to prosecute an appeal and incur the costs and vexations incident to it, when the *only* result of it could be to defeat his interests. He had a judgment in his favor, *which he insisted upon*, and that, too, so pertinaciously that the plaintiff applied to the Legislature to interfere in its behalf. The defendant denied the right of the Legislature to interfere, *and contested the constitutionality of its action*, and yet we are asked to believe (after all this) he willingly made an agreement to the effect that whether or not the law *was constitutional, there should be a judgment against him!* There are cases so clear in their nature that the simple statement of them constitutes their clearest illustration, and I think this is such a one. My opinion is, the judgment ought to be stricken out, and the original judgment restored.

Upon this question, however, the court is equally divided in opinion, and, therefore, the ruling of the court below, refusing to strike out the judgment, must be affirmed.

As to the demurrer in the *sei. fa.* case, the court is unanimously of opinion that the defence was not the subject matter of a plea at law, and that the judgment on demurrer was right, a majority of the judges being of the opinion, that as the agreement was designed to prevent the plaintiff from proceeding on his judgment, if the act of Assembly was declared to be void, the defendant is entitled to be discharged in a court of equity, and that relief may now be had against the judgment.

*Judgment affirmed without prejudice.*

(Decided June 25th, 1858.)

**Ecoleston, J.**—A majority of the court have expressed an opinion that, by a proceeding in equity, the appellants may be

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relieved from the judgment of the appellee against Samuel Miller, rendered at November term 1847. In this view of the subject I do not concur.

It is a well established principle of equity that where equities are equal, and one party has the legal advantage over the other, a court of equity will not interfere by taking away such advantage at law.

Applying this rule to the present controversy, my opinion is, that the appellants are not entitled to relief in a court of equity.

At November term 1843, this case was first tried, when a verdict was given in favor of the defendant, Samuel Miller. A motion was made for a new trial, which motion was overruled, at November term 1844, and judgment given for defendant.

The case not having been so conducted on the part of the plaintiff as to give him the benefit of an appeal, as no bills of exceptions on his part had been regularly prepared and signed, he applied to the Legislature for relief in the premises, and the act of 1845, ch. 358, was passed. This act provides, "That the court of Washington county be and the same is hereby authorized and required to grant an appeal in the case heretofore decided by said court, wherein the State of Maryland, use of Lewis Fiery, was plaintiff, and a certain Samuel Miller was defendant; and that the points of law decided, and the instructions given, by the said court, as set forth and contained in an appeal already granted by said court, wherein the said State of Maryland, use of Henry Fiery, was plaintiff, and the said Samuel Miller defendant, and in every way similar to the case first herein mentioned, be set forth and embodied in the record of the appeal herein provided for; *provided*, nevertheless, that the said court shall be satisfied that the plaintiff aforesaid lost his right to appeal in the above case, at the proper and regular time for taking the same, by a misunderstanding of the counsel engaged in the case, in regard to the taking of the said appeal."

Under this act the case was prepared by Washington county court to be sent up to the Court of Appeals. It was not, however, sent up as *thus prepared*. But, by the agreement of the

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parties, the judgment of 1844, rendered in favor of the defendant upon the verdict of November term 1843, was stricken out, the cause reinstated upon the docket, and, at November term 1847, a verdict and judgment were rendered in favor of the State, use of Lewis Fiery.

Among other things agreed upon by the parties, it was provided, "That if the proceedings of Washington county court, in signing and sealing the bills of exceptions set forth in said agreement, should be deemed by the Court of Appeals void, in consequence of the unconstitutionality of the act of Assembly by which those bills of exceptions were authorized and directed to be signed and sealed by Washington county court, then the appeal in the case should be dismissed; and that otherwise, it should be heard and determined upon the questions of law which were to be raised and decided at the trial of that cause, then about to be tried in Washington county court; which questions were similar to those presented in the case of the State, use of Henry Fiery, vs. said Samuel Miller. And it was further agreed, that the case of Lewis Fiery should abide the result or decision of the Court of Appeals in the case of the State, use of Henry Fiery, vs. Samuel Miller, upon the bills of exceptions of the defendant, which had been taken in the last mentioned case at the term when this agreement was made."

The decision of the Court of Appeals in the case of Henry Fiery, was in his favor, and they affirmed the judgment below. Believing that the act of Assembly referred to in the case of Lewis Fiery was unconstitutional, the appellate tribunal dismissed the appeal, under and by virtue of the provision contained in the agreement. This dismissal of the appeal, as a matter of course, left the judgment of 1847, standing upon the docket of the court below, in favor of Lewis Fiery; and this is the judgment against which the appellants are now wishing to have relief.

They insist, that although the agreement did provide for a dismissal of the appeal, in case the court should decide the special act of Assembly to be unconstitutional, without any express provision in regard to reversing or annulling the judg-

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ment of 1847, on which the appeal had been taken, it was, nevertheless, the design of the parties, and the true spirit of the agreement, that if the law should be held to be unconstitutional, the plaintiff's judgment should not be enforced, but become a nullity; the real object of the agreement being to test the constitutionality of the law. And the appellants contend, that only in the event of the law being held constitutional, was it intended that the case of Lewis Fiery should abide and be governed by the result of Henry Fiery's case. The appellee's counsel, however, does not admit this to be a correct view of the matter.

If relief should be sought in equity, it would be proper to look at the circumstances under which the agreement in dispute was made, and it will then appear that the claims of Lewis Fiery and Henry, his brother, were precisely alike, in principle. In Henry's case bills of exceptions were taken, and, finally, he succeeded in recovering his claim; the verdict and judgment, at the last trial below, were in his favor, and the judgment was affirmed in the Court of Appeals. During the progress of the trial in the case of Lewis, no bills of exceptions were prepared. This, as alleged by his counsel, was the result of a belief that it had been agreed and understood that the exceptions should be prepared after the trial was over. Subsequently, when it was proposed to have the exceptions signed, under the alleged previous understanding, the counsel for the defendant objected, upon the ground that he had no recollection of such an agreement. In consequence of this alleged misunderstanding, the act of 1845, ch. 358, was passed by the Legislature, for the purpose of allowing Washington county court to grant an appeal.

A rule was laid on Miller to show cause why this act should not be carried into effect, which rule he answered and resisted. Affidavits on the subject were filed on both sides, and upon the consideration of them, the court being of the opinion that the points of law decided, and the instructions given, in the cause of the State, use of Henry Fiery, against S. Miller, were substantially the same as those decided in the case of Lewis Fiery against the same defendant, and that Lewis had

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*lost his right to appeal*, at the proper time for taking the same, by a *misunderstanding of the counsel* in the case; bills of exceptions were signed by the court, and the cause ordered to be sent up to the Court of Appeals, in compliance with the said act.

After these bills were signed, and the cause ordered to be sent up, the agreement to reinstate the case of Lewis for a new trial, was entered into, by which the necessity of taking the case to the Court of Appeals by the plaintiff, under the proceedings directed by the act of Assembly, was dispensed with. The motive for this was to avoid unnecessary expense and delay, knowing, as the parties by that time did, how those exceptions would be decided, inasmuch as the same exceptions had then been decided upon by the appellate court on the first appeal in Henry's case, and in his favor. And the agreement so arranged the case of Lewis that, instead of the plaintiff being the appellant, as provided by the act of Assembly, it was made necessary for the defendant to appeal. Of course, when his appeal was dismissed, the judgment appealed from was left in full force at law against him.

Under the circumstances, it would seem to be very evident that, but for the misunderstanding between the counsel, bills of exceptions would have been regularly taken in Lewis' case, on the trial in 1848; and, if so, judging from the result in Henry's case, and the precise similarity of his claim to that of Lewis, it is a fair and reasonable inference that the claim of the latter would have been established. I, therefore, am of the opinion that a court of equity should not grant relief to the appellants.

Whatever may have been the intention of the agreement, it is certainly true that it has been before the former, as well as the present, Court of Appeals, and it has not, as yet, had the effect to reverse, strike out, annul, or enjoin the judgment. But it is said the appellants may now be relieved from it by a court of equity. Should there be a proceeding in equity for that purpose, it would not only bring before the court the construction of the agreement, but also the circumstances which led to its execution, including, likewise, the nature and char-

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acter of the appellee's claim, on which his suit was instituted. He yet has the judgment at law, and if the equities of the parties were equal, a court of equity would not annul or enjoin his judgment. And, moreover, in view of all the circumstances, I think the equities are in his favor.

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### JAMES WEDGE *vs.* THE STATE.

The act of 1852, ch. 63, makes the *margin* part of the indictment, and a defect for want of a *venue* in the *body* of an indictment, it being stated in the *margin*, is cured thereby; the design of this act was to relieve prosecutions from some of the technical refinements existing at common law; and should be construed rationally.

Under this act, a judgment cannot be stayed or reversed for any mere imperfections in matters of form, which do not tend to the prejudice of the defendants.

#### ERROR to the Circuit Court for Prince Georges county.

The plaintiff in error was indicted in Prince Georges county for larceny. The record states that the proceedings took place at the April term 1858, of the circuit court for Prince Georges county, "begun and held in Upper Marlborough town, in and for said county, for the trial of all felonies, crimes, offences and misdemeanors committed in the county of Prince Georges." The indictment is as follows:

"State of Maryland, Prince Georges county, to wit: The jurors of the State of Maryland, for the body of Prince Georges county, do, on their oaths, present, that James Wedge, a free negro, on the eighth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, one wagon of the value of ten dollars, of the goods and chattels of one Francis Lusby, then and there being found, feloniously did steal, take and carry away, contrary to the act of Assembly in such case made and provided, and against the peace, government and dignity of the State."

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The traverser pleaded *not guilty*, and the cause, upon his suggestion, having been removed to Anne Arundel county for trial, the plea was stricken out, and a *general demurrer* filed, which was *overruled*, the plea again entered, and the case tried and a verdict of guilty rendered. A motion in arrest of judgment was then made, upon the grounds that the indictment does not charge that the offence was committed in Prince Georges county, and is defective by reason of the omission of the statement of the venue, and in other respects, and that the court erred in deciding that these defects were cured by the act of 1852, ch. 63.

This motion the court (BREWER, J.,) overruled, and passed sentence upon the prisoner. To correct this judgment the traverser sued out the present writ of error.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

*Jas. S. Franklin* and *Oliver Miller* for the plaintiff in error:

1st. This indictment is clearly defective at *common law*, by the omission of the *venue* in that part of it technically known as the *statement*, in which every material fact which is a necessary ingredient of the offence, must be distinctly set forth. *Wharton's Cr. Law*, (3 Ed.) 168. The *caption*, which ends with the words "*present that*," forms no part of the indictment, but is a mere *preamble*, in which are set forth the style of the court at which, and the grand jury by whom, the indictment *which follows* is found, (*Wharton*, 150;) a reference to the *caption* in the *statement* is insufficient, (*Wharton*, 167, 168,) and jurisdiction of the court is a material fact, which must be shown in the *body* of the indictment. In this case there is a total omission to charge that the stealing occurred in Prince Georges county. If the words "*then and there*," in the *statement*, were permitted to refer to the *caption*, there is no *time* there stated to which the word *then* can refer, and if restricted to the legitimate reference, viz: to the preceding part of the *statement*, there is no *place* or *venue* to which the word *there* can refer. Time and place must be added to every ma-

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terial fact in the indictment, (*Wharton*, 162,) and though after time and place are *once distinctly set forth in the statement*, they may be referred to by the words *then* and *there*, (*Wharton*, 164,) yet otherwise they are insufficient, though stated in the caption. 1 *Wat. Arch.*, 85—1, note 2.

2nd. The indictment being thus clearly defective at *common law*, it is not cured by the act of 1852, ch. 63, upon *demurrer*, but such defect, when objected to in that mode, is still fatal. This act declares "that no indictment shall be *quashed*," "nor shall any *judgment* be *stayed* or *reversed* for want of a proper and perfect venue," &c., "nor for any matter or cause which might have been a subject of *demurrer*." This is neither a motion to *quash* nor to *stay the judgment*, but the error assigned is, that judgment should have been given for the prisoner upon the *demurrer*. A motion to *quash* is in every respect distinct from a *demurrer*; the judgment in the one case is, that the indictment be *quashed*, in the other, that the party is not bound to answer. *Arch.*, 79, 81. *Quashing* is *discretionary* with the court, and refusal is not ground for writ of error, but a *demurrer* is in both respects directly the reverse. *Wharton*, 240 to 244. 1 *Wat. Arch.*, 101—1, 115. The object of the act of 1852, was not to *cure* the specified defects in indictments, but simply to *compel* parties to take advantage of them by *demurrer*, and to prevent parties from taking advantage of them by a *motion in arrest*, after trial and verdict, in which case, if sustained, criminals would escape punishment. It does not profess to say that such defects shall not be equally fatal as before, upon *demurrer*. Again, the act of 1852 is, with the addition of the words "*no indictment shall be quashed*," a mere copy of the *Statute 7 Geo. 4, ch. 64, secs. 20, 21*, and the English decisions, under this statute, declare the *enumerated defects* to be *equally fatal* on *demurrer*. *Arch. Cr. Law*, 37, 52, 54, 78, 79.

3rd. The *demurrer* opens the *whole record* to the inspection of the court, and this record shows the institution of the whole proceedings in this prosecution in a court which has no jurisdiction, and which is unknown to the constitution and laws of this State. The indictment, moreover, does not profess to be

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found by the *grand jury*; it simply says, “the *jurors* upon their oaths do say,” &c.

*James Revell*, State’s Attorney for Anne Arundel county, for the State:

1st. Every necessary allegation in the indictment was sufficiently set forth, and, as the venue, it sufficiently charged the offence to have been committed in Prince Georges county. *Arch. Cr. Pl.*, 16. 1 *Chitty’s Cr. Law*, 177, 193.

2nd. But even if the indictment is defective at common law, the defect is cured by the act of 1852, ch. 63, sec. 2. That act says, that no indictment shall be *quashed*, nor shall any judgment be *stayed* or *reversed*, “for want of a proper or perfect venue, when the court shall appear, by the indictment, inquisition or presentment, or by the statement of the *venue in the margin thereof*, to have had jurisdiction over the offence.” This, in effect, makes the caption or *margin* a part of the indictment, and the reference thereto, by the words “then and there,” in the body of the indictment, makes the venue perfect.

3rd. The other objections urged against this indictment, are cured by the words of the same law which prohibit the quashing of an indictment, or the staying or reversal of the judgment, “by reason of any mere defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant.”

**TUCK, J.**, delivered the opinion of this court.

We are of opinion that the ruling of the court below on the demurrer was correct, and affirm the judgment.

All the defects in the indictment, suggested in behalf of the plaintiff in error, are within the act of 1852, ch. 63, and for none of them can the judgment be reversed. The act, in effect, makes the margin part of the indictment, and thus cures the supposed defect as to want of a venue. Its design was to relieve prosecutions against offenders from some of the technical refinements existing at common law, and should be construed rationally. *Keller vs. State*, 11 *Md. Rep.*, 525. We cannot suppose that the accused, with that indictment before

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him, could be ignorant that he was charged with the commission of a larceny in Prince Georges county, and that his defence must be shaped accordingly.

The other objections to the indictment, if defects at all, are mere imperfections in matters of form, which, in the language of the act, "did not tend to the prejudice of the defendant."

As the reasons assigned in support of the motion in arrest of judgment, are based on matters which, if available at all, might be urged on demurrer, the act of Assembly denies to the plaintiff in error any benefit of that motion. The subject of the motion, however, was necessarily considered in disposing of the demurrer.

*Judgment affirmed.*

(Decided June 26th, 1858.)

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### GEORGE E. FRANKLIN *vs.* THE STATE.

A statute, in its *enacting part*, prohibited any person from selling spirituous liquors to any slave, "*unless upon the written order of his or her master, mistress, or owner.*" An indictment, under this act, charged a party with selling liquor to a slave, "*who then and there did not have a written order of his master, mistress, or owner, authorizing the said sale.*" HELD:

That this indictment was defective in not sufficiently negativing the *existence* of the written order; it is not enough to negative the possession of the order by the slave, but it must appear affirmatively on the face of the indictment that the act of the traverser was not done *upon* such order.

The constitutional provision that, "*In the trial of all criminal cases, the jury shall be judges of law as well as fact,*" is merely *declaratory*, and has not altered the pre-existing law regulating the powers of the court and jury in criminal cases.

The jury, in a criminal case, have no right to judge of the *constitutionality* of an act of Assembly, and it is proper for the court to prevent counsel for the traverser from arguing that question before the jury.

ERROR to the Circuit Court for Anne Arundel county.

The plaintiff in error was indicted for a violation of the act of 1858, ch. 55, passed on the 17th of February 1858, entitled

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"An act to prohibit the sale of intoxicating liquors in the city of Annapolis, or within five miles thereof, to minors and people of color."

The 1st section of this law enacts, "That from and after the first day of April next, it shall not be lawful for any person or persons, *whether licensed to sell spirituous liquors or not*, to sell, dispose of, barter, or give, within the corporate limits of the city of Annapolis, or within five miles thereof, any spirituous or fermented liquors or cordials of any kind, or in any quantity whatever, to any youth or minor under the age of twenty-one years, *without the written order* of the parents and guardian of such minor, nor to any free negro or mulatto, *except upon the certificate* of three respectable freeholders of the city of Annapolis, that said free negro or mulatto is of good and temperate habits, and of moral character, *or the written order* of some physician; nor to any negro or mulatto slave, *unless upon the like order of his or her master, mistress, or owner*," and then fixes a fine as a penalty.

The 2nd and 3rd sections provide for the suppression of the licenses of such persons as, having licenses, violate the provisions of this act. The 4th section provides that any one order mentioned in the first section, shall not be valid for a longer period than two days from its date. The 5th, 6th and 7th sections require the court to give the act in charge to the grand jury, the sheriff, and constables, to exercise proper diligence to detect violations of the law, give one-half the fine to the informer, and make him a competent witness.

The 8th section enacts, "That a copy of this act shall be furnished, by the clerk of the circuit court for Anne Arundel county, to each person residing in the city of Annapolis, and within five miles thereof, who shall receive a license under the provisions of this bill, for which he shall receive fifty cents; and the clerk shall, before he delivers any license to the parties aforesaid, administer and endorse upon the said license the following oath or affirmation: I, A. B., do swear upon the Holy Evangel of Almighty God, that I will faithfully comply with the provisions of this act." The 9th section provides "that this act shall take effect from and after the first day of April, eighteen hundred and fifty-eight."

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The indictment charges that the plaintiff in error, "being then and there a person having a license authorizing the sale of spirituous liquors, on or about the fifteenth day of April, in the year of our Lord eighteen hundred and fifty-eight, with force and arms, at the county aforesaid, within the corporate limits of the city of Annapolis, unlawfully did sell and dispose of a certain quantity of spirituous liquor, to wit, one pint of spirituous liquor commonly called whiskey, to Samuel Jones, slave of Miss Ellen Stockett, and who then and there did not have a written order of his master, mistress, or owner, authorizing the said sale of the said quantity of spirituous liquor as aforesaid, to the said Samuel Jones, contrary," &c.

To this indictment the plaintiff in error filed a *general demurrer*, which the court (*Jonathan Pinkney*, special judge,) overruled, and the case having been tried before a jury upon the plea of *non cul*, and a verdict of guilty rendered, the traverser moved in arrest of judgment for the following reasons:

1st. Because, at the trial of the case, the counsel for the traverser undertook to argue before the jury that the act of 1858, ch. 55, was unconstitutional, and thereupon Judge Pinkney objected, and said that the counsel could not discuss a constitutional question before the jury, and told the jury that though they were made, by the constitution, judges of the law and fact in criminal cases, they had no right to determine a constitutional question, or whether said law was void, if they believed it was unconstitutional. This ruling of the judge is placed on the record so that in the event of this case being carried to the Court of Appeals by writ of error, the point of his ruling may be corrected by said court.

2nd. Because the traverser obtained a retailer's license and a retailer's liquor license, under the act of 1856, ch. 353, which authorized him to sell to all persons not excepted by the said licenses and the then existing laws.

3rd. Because the court permitted the State to prove by the clerk, by reference to his record, that the traverser had obtained such licenses, though the counsel for the traverser objected to the admissibility of such testimony, because no notice had been

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given to him to produce the licenses, and further, having without notice produced them, he insists that said original licenses are the best, and, therefore, the only admissible evidence. (These licenses, which are set out with this reason, are in the usual form, were issued on the 9th of May 1857, and purport "to continue until the first day of May next.")

The court overruled the motion and imposed the fine prescribed by the act, and to correct this judgment the present writ of error was sued out by the traverser.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BARTOL, J.

*Jas. S. Franklin* and *Thos. G. Pratt* for the plaintiff in error:

1st. The court below erred in refusing to permit the counsel for the accused to argue to the jury the invalidity of the act under which he was indicted. By the 5th sec., art. 10, of the constitution, it is provided, that "In the trial of all criminal cases, the jury shall be the judges of the law as well as fact." Independent of this constitutional provision, the jury were the exclusive judges of all facts, and by this provision they are as well the exclusive judges of the law, and necessarily of the *validity*, as well as of the meaning and construction of the law. The Debates of the Convention which framed the constitution, (2 vol., 767, 768,) show the views there presented on this point, but we are not to speculate as to what were the views of that body, or what they *ought* to have done; we can only look to what they *have done*. In *State vs. Mace*, 5 Md. Rep., 350, and *Manly vs. The State*, 7 Md. Rep., 147, this court has said, that the words of the constitution must be construed in the sense in which the people who adopted it *understood them*. Now both the *people* and the *convention* are presumed to have known what the law on this subject was at the time this clause was framed and adopted, (26 Ala. Rep., 326, *Duramus vs. Harrison*,) and prior to this time, the judges had the power to judge of the law, to say to the jury such is the law, and that the law made such and such offences crimes, that such and

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such acts came within the law, but had no power to *enforce* their instructions in case of an *acquittal*. The jury had power to disregard, if they chose, the instructions of the court, and to judge of the law for themselves, and, in this sense, they were said to be, in criminal cases, judges of *the law and fact*. *3 Johns. Cases*, 364 to 376, *People vs. Cruswell*. 18 *Maine*, 346, *State vs. Snow*. 4 *Blackford*, 150, *Warren vs. The State*. The constitution designed to go further, and enact something more, to give to the jury some further powers, and every voter when *voting* upon this constitution, supposed he was conferring upon the jury, *in all criminal cases*, the *exclusive judgment of the law*. There is no exception made in the clause, and the court can make none.

2nd. The act of 1858, ch. 55, is unconstitutional, 1st, because it embraces more than one subject, and the subjects embraced are not described in the title, as required by the 17th sec. of art. 3rd of the constitution. The *title* is, "An act to prohibit *the sale* of intoxicating liquors," &c. The *body* of the law prohibits *disposing of*, and *bartering*, and *giving* intoxicating liquors. It also includes *persons not licensed*, when by a previous law such were prohibited from selling such articles. The subjects of the law are, therefore, more than *one*, and are not disclosed by the title. 2nd, because the plaintiff in error, as a licensed retailer, under the act of 1856, ch. 353, acquired from the State, for the same consideration, the same privileges which a similar license conferred upon any other person in any other part of the State, and the Legislature possessed no power to discriminate even *prospectively*, in favor of a class of merchants in one part of the State or county, over the same class in a different locality, (*5 Arkansas*, 204, *Pike vs. The State*;) and, moreover, under his license he had acquired a *vested right* to deal, *until the 1st of May 1858*, in all articles and with all persons sanctioned by the act of 1856, ch. 353, or not prohibited by that act, or by other acts then in force, and the attempt of the Legislature, by the act of 1858, ch. 55, (if that act is to be construed as operating upon *existing licenses*,) to deprive him of this *vested right*, was extra-constitutional and void. 1 *Bl. Com.*, 44. 2 *Inst.*, 184.

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**1 Kent**, 418, 419. *Dwarris on Statutes*, 664, 681. **7 G. & J.**, 7, *Norris vs. Trustees of Abington Academy*. **R. M. Charlton's Rep.**, 324, *Forsyth vs. Marbury*. 3rd, because the 31st and 34th secs. of the 3rd art. of the constitution, and the acts of Assembly providing for the publication of the laws, are to be construed in *pari materia*, and no law could constitutionally operate until published, and, consequently, this act of 1858, which provides no time for its publication, and which is made to take effect before publication, is unjust, oppressive, and against the spirit of the constitution, and, therefore, void. **R. M. Charlton's Rep.**, 333. **9 Gill**, 309, *Baugher vs. Nelson*. **9 G. & J.**, 412, *Regents, &c., vs. Williams*. **1 Paine's Rep.**, 23, *Ship Cotton Planter*. **1 Greene**, (*Iowa Rep.*,) 68, *Calkin vs. The State*. *Dwarris on Statutes*, 664, 682.

3rd. But if the law is not, for these reasons, unconstitutional, it does not, by its true construction, operate upon *existing licenses*, and the court will so construe it as to give it a *prospective* operation, in so far as it is to affect those who had already obtained licenses under previous laws, making it operative as to them only when their licenses expired, (**1 Ohio State Rep.**, 15, *Hirn vs. The State*,) and the 8th section of the act seems fully to warrant this interpretation of it.

4th. In so far as it operates upon parties having licenses, it is *repealed* by the subsequent act of 1858, ch. 414, passed at the same session, which is a general license law, and authorizes *all persons* to take out licenses thereunder, upon the terms and conditions *only* therein prescribed.

5th. The indictment is defective, because it does not aver that the *slave* therein mentioned was either a *negro* or *mulatto slave*, as required to constitute the offence under the act. By our laws, a *white man* who marries a *negro woman* may be a *slave*; and in indictments for statutory offences, especially in cases of *mala prohibita*, the language of the act must be strictly followed, nor will any defect of this kind be cured by verdict. **Wharton's Cr. Law**, 132 to 136. **Arch. Cr. Pl.**, 46 to 48. **1 Chitty's Cr. Law**, 282, 286.

6th. The indictment is also defective, because it does not sufficiently negative the existence of a written order, autho-

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rizing the sale by the traverser. It charges that *the slave* did not have the order authorizing him to buy, whereas the law requires that the dealer should not have the order authorizing him to sell. The case of *State vs. Nutwell*, 1 *Gill*, 54, is conclusive on this point.

*James Revell*, State's Attorney for Anne Arundel county, for the State:

1st. The question, whether the court below erred in refusing to permit the counsel for the traverser to argue to the jury that the law under which this indictment was framed, was unconstitutional, is not before this court for review, because *this reason*, assigned to sustain the motion in arrest, *forms no part of the record*, and a judgment can only be arrested for matter appearing *on the record*. But if the question is open for review here, there was no error in the court's action in this respect. The constitutional provision, that, "in the trial of all criminal cases, the jury shall be judges of law as well as fact," is merely *declaratory* of what the common law was on this subject, and confers upon the jury no *new* powers. The jury have the right to judge of the law for themselves, and apply it to the facts proved before them, but they never had the power to say that a law under which an indictment was framed, was *unconstitutional*. The most strenuous advocates for the rights of juries never have gone to such a length as this. Mr. Justice Baldwin, who went as far as any judge ever did in sustaining the right of juries to be judges of law in criminal cases, in the case of *United States vs. Shive*, 1 *Bald. C. C. Rep.*, 512, which was an indictment for counterfeiting United States' bank notes, *refused* to permit the jury to be judges of the *constitutionality* of the bank's charter, or the counsel for the traverser to argue such a question before them.

2nd. There was no error in overruling the demurrer, 1st, because the act of 1858, ch. 55, is, in all respects, constitutional and valid. The Legislature had the clear right to pass such a law under the 13th art. of the Bill of Rights, which declares that "fines, duties or taxes may properly and justly be imposed or laid on persons or property, with a *political view*,

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for the *good government and benefit of the community.*" 11 *Md. Rep.*, 525, *Keller vs. The State*. 3 *Gill*, 1, *Burton, et al., vs. The State*. It is a law which the State has the power to pass, in exercise of the *right* to regulate its internal police, and every thing that relates to the *morals* and *health* of the community. It does not infringe the provision of the 17th sec. of the 3rd art. of the constitution, in reference to *title* and *subject* of laws, (7 *Md. Rep.*, 151, *Davis vs. The State*; 11 *Md. Rep.*, 525,) and though a *penal law*, the intention of the law makers must govern in its construction, and it is not to be construed so strictly as to defeat the *obvious intention* of the Legislature. 5 *Wheat.*, 95, *United States vs. Willberger*. 2 *Pet.*, 367, *American Fur Co. vs. The United States*. Nor does it interfere with any *vested rights* of parties having licenses, for, "in the nature of things, there can be no vested right to violate a *moral duty*, or to resist the performance of a *moral obligation*; there can be no vested right to do a wrong." 9 *Gill*, 299, *Baugher vs. Nelson*. 2nd, because the indictment sufficiently charges that the sale was to a *slave*, and sufficiently *negatives* the written order, the words of the indictment being, in this particular, in the *language of the act*, and are, therefore, sufficient. 2 *Md. Rep.*, 201, *Rawlings vs. The State*. 3 *G. & J.*, 8, *State vs. Dent*. 12 *G. & J.*, 260, *State vs. Price*.

J.E GRAND, C. J., delivered the following opinion.

Many questions were argued at the bar not important to be decided, nor indeed presented by the record. But, looking to the policy of the act of 1858, ch. 55, and the reasonable anxiety of the community upon which it is to operate, to ascertain by judicial interpretation its true meaning, I will express my opinion in regard to some matters not absolutely necessary to the decision of this particular case. I do this because I believe the public have the right to expect it of the appellate court, and, also, because it will subserve the general good by putting to rest quibbles and doubts, which, unless quieted by proper authority, tend to the annulment of the legislative will.

The plaintiff in error was indicted, he being a person hav-

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ing a license authorising the sale of spirituous liquors, that he, "on or about the fifteenth day of April, in the year of our Lord, eighteen hundred and fifty-eight, with force and arms, at the county aforesaid, within the corporate limits of the city of Annapolis, unlawfully did sell and dispose of a certain quantity of spirituous liquor, to wit, one pint of spirituous liquor, commonly called whiskey, to Samuel Jones, slave of Miss Ellen Stockett, and who then and there did not have a written order of his master, mistress or owner, authorizing the said sale of the said quantity of spirituous liquor as aforesaid, to the said Samuel Jones," &c., &c. To this indictment the plaintiff demurred. The court overruled the demurrer, when a jury was sworn, who returned a verdict of guilty, upon which judgment was entered. A motion in arrest of judgment was filed, assigning several reasons in support thereof.

If for no other reason, than that *the indictment does not sufficiently negative the existence of a written order authorising the sale by the traverser*, I think the demurrer should have been sustained. The case of the *State vs. Nutwell*, 1 Gill, 54, is clear to this point. In that case, the party had been indicted under the act of 1817, ch. 227, which made it unlawful for any licensed retailer or other person residing in certain counties, "accustomed to make and sell distilled spirits or other liquors, to suffer any free negro or mulatto, or any negro or mulatto servant or slave, to be in his, her or their store-house, or other house, wherein he, she or they may be accustomed to sell distilled spirits or other liquors, between sunset in the evening and sunrise of the succeeding morning." The act, however, contained a provision by which it was provided, that the act should not extend to the case of such servant or slave as should "have a written order or license for that purpose, from his master, mistress, overseer or other person, in whose employment he might be with the consent of his owner." The indictment after other averments declares as follows: "*the said slave then and there not having a written order or license for that purpose from his master, against the act*," &c. In the case now before the court, the words are as follows: "*and who (that is the slave) then and there did not have a written order of his*

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*master, mistress or owner, authorizing the said sale," &c.* By a comparison, it will be perceived that the language in both instances is of the same import, although not identical, and therefore that of the court in *State vs. Nutwell*, is equally applicable to this. "The omission," say the court, "to exclude a license by the necessary averment of a want of one, was a fatal defect; the non-existence of a license being an essential ingredient in the constitution of the offence, according to the true and sound construction of the act of Assembly, upon which the prosecution was founded." In this case, the words of the statute are not followed, and in this particular, it is unlike that of the *State vs. Rawlings*, 2 Md. Rep., 201. Without inquiring as to the sufficiency of the other parts of the indictment, the defect which I have stated justifies the reversal of the judgment.

For the reasons I have given, I will now indicate my views in regard to some of the other questions discussed at the bar. It is stated, as one of the reasons for an arrest of the judgment, that the court refused to allow the counsel of traverser to discuss, before the jury, the *constitutionality* of the act of Assembly. Although the question is not presented by the record, it is yet proper the meaning of the words of the 5th section of the 10th article of the constitution should be expressed. This is my decided opinion, for, whatever privilege they give to the party charged with crime, he ought to enjoy without being subjected to expensive prosecutions of appeals and writs of error. The language is: "In the trial of all criminal cases the jury shall be the judges of law as well as fact."

It was argued, that the true interpretation of these words authorized the jury to judge of the constitutionality of the act of Assembly. In this opinion I do not concur. The debates which took place in the Convention that framed the Constitution, show what were the reasons that induced the adoption of the section. It is apparent from these debates, that opposing views as to the powers of a jury in a criminal case, prevailed in different parts of the State, and, that to guard in the future against such conflict, the provision was inserted in the constitution. It was well known that some members, both of the

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judiciary and the profession, held, that juries in criminal cases were the judges of law as well as fact, whilst others held a directly contrary opinion. It is not now important to inquire on which side there was a preponderance of authority and reason. When the meaning of the terms are fixed, there is an end to controversy in regard to the relative powers of court and jury.

So far as I know, there is no instance in which a court admitted that the words, "judges of law as well as fact," authorized the jury to decide on the constitutionality of a law. With those who insisted upon the enlarged power conferred by the words in our constitution, there was no pretence that it authorized a judgment by a jury of the constitutionality of an act of Congress or of the State Legislature. All they contended for was, that in a criminal case the jury were not bound to abide by the interpretation of the court of the meaning of a law, but were free to construe and apply it according to their own judgments. They never pretended the jury had the right to decide on the constitutionality of an act defining murder, arson or any other crime, but that they had the right to affix their own meaning on the particular law, and to determine for themselves, whether the facts proven brought the traverser within that meaning. The words in the constitution have no greater significance since their incorporation into the organic law than they had previously, and I think I have given to them the broadest latitude ever sanctioned or seriously countenanced by any respectable authority.

Without determining whether under the police power conferred by the 13th section of the Bill of Rights, the Legislature, "with a political view," and "for the good government and benefit of the community," could, before the expiration of a license granted by the State, superadd additional penalties or prescribe additional limitations, I am of opinion, that whatever may be the correct view in this regard, in the passage of the act of 1858, ch. 55, no such power was exercised. In my opinion, the act was to go into operation on the first day of April, but not to operate on those whose licenses would not expire until May following. The act contemplated the party

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should have a license, and that he should take an oath to observe the directions of the act. Of course I do not now allude to persons other than those having a license; a different class of reasons apply to them. The case before the court is that of a person having a license, and it is clear to my mind, that whilst the purpose of the act was to allow persons to take out a license under it, on and after the first day of April, it was yet no part of its scope to qualify the privilege which, by its terms, would not expire until the first day of May.

I entertain no doubt the Legislature has the power to forbid the sale of spirituous liquors to minors and slaves. A sale necessarily implies a contract, which, strictly speaking, neither an infant or slave can make, and therefore, if for no other reason, a party dealing only by virtue of a license has no just right to insist, it is an abridgment of his rights to prevent him from trading with either infants or slaves.

The act makes it unlawful, within the prescribed limits, "to sell, dispose of, barter or give," any spirituous liquors, &c. Now I understand all these words as intended but to express one idea, that, for profit, liquor should not be given to the persons mentioned.

There are some historical facts so notorious, that courts are bound to notice and apply them when interpreting the language and purposes of the Legislature. To ignore them, would be inevitably to superinduce one of two results, both of which, in their nature, are productive of great mischief, that is to say, to make it incumbent for the legislative body to set out, by way of preamble, a long detail of facts and reasons, with which the entire community are perfectly familiar, or to have their action frittered away by philological niceties, more noticeable for their ingenuity than their practical good sense. The whole nation knows that many laws, especially in the Eastern states, were some years since passed, restraining in some instances, and in others, absolutely forbidding the sale of intoxicating liquors, and that one of the most favored devices resorted to, to avoid the penalty of the law, was to sell some trifle for a price bearing no proper proportion to its value, and then, to "give" the liquor. It was to guard against such dis-

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creditable evasion, that words other than that of "sell" were employed in legislation, such as "*dispose of*" or "give," the whole of them, as before observed, having but one object in view. In construing any writing, whether it be a law or anything else, every portion of its language should be construed always with special reference to the subject matter and its immediate context. I hold the word "give," as it appears in the act of 1858, to be as comprehensive, and to mean the same, as the word "sell." Every one knows words have different significations according to the association in which they are found. Thus, the word "gift" in some connexions, means "*bounty*" or "*gratuity*," whilst in others "*to pay*." A reference to Todd's, Johnson's and Walker's Dictionary, will show the following definitions of the verb "*to give*," and the authorities for the same "*To pay as price or reward, or in exchange.*"—Job ii. "Is it lawful for us to give tribute unto Caesar or no."—Luke xx. "*To enable*," Hooker. "*To pay*," Shakespeare. The meaning of the word "barter" is thus given, "*To give any thing in exchange for another,*" as liquor for money. To "*dispose*" is defined as the equivalent of "*to give*." And, in Webster, many definitions of the word "give" are to be found, among which is the following: "*to pass or deliver the property of a thing to another for an equivalent; to pay.*" This is nothing more nor less than the description of a sale.

If I have affixed the correct meaning to the words taken from the body of the act, (and that I have must be manifest if the decisions of lexicographers of the greatest repute be of any authority,) then, there is no efficacy in the suggestion, that the title does not properly, within the meaning of the 17th section of the 3rd article of the constitution, describe the subject matter of the act. For these reasons I am in favor of the reversal of the judgment.

Inasmuch as a great deal was said in argument by counsel, *pro* and *con.*, in regard to the policy of such legislation as the act of 1858, I will merely observe, that although I have very strong convictions on the subject, yet, whilst acting in a judicial capacity, I have nothing to do with such considerations;

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it is for the legislative branch of the government to decide that question, the judiciary having nothing whatever to do with it.

BARTOL, J., delivered the opinion of this court.

We concur with the Chief Justice, in the propriety of reversing the judgment of the circuit court in this case, upon the ground, that the indictment does not sufficiently negative *the existence of the written order* required by the statute.

It is a necessary ingredient of the offence, that the act charged should be done without such written order. The words of the act are, "nor to any negro or mulatto slave, *unless upon* the like order of his or her master, mistress or owner," and being in the enacting part of the statute, must be fully negatived in the indictment. This principle has been recognized in the cases of *The State vs. Nutwell*, 1 Gill, 54, and *Rawlings vs. The State*, 2 Md. Rep., 201.

This indictment charges the traverser with selling, &c., "spirituous liquor" to "Samuel Jones, a slave of Miss Ellen Stockett, and *who then and there did not have a written order of his master, mistress or owner*," &c.

This is not within the statute. It is not enough to negative the possession of the order by the slave; it must appear affirmatively on the face of the indictment, that the act of the traverser was not done *upon* such order.

The phraseology of the act of 1858, ch. 55, is different, in this respect, from that of the act of 1817, ch. 227. In the case of *Rawlings vs. The State*, an indictment under the act of 1817, which negatived the slave's having the written order or license required by that act, was held to be sufficient because it was in the words of the statute. The indictment before us is not in the words of the act of 1858.

We concur also in the views expressed by the Chief Justice, upon the question of the power of the jury in criminal cases, to pass upon the constitutionality of the law, and think that the attempt of the counsel of the traverser to argue that question before the jury, was properly arrested by the circuit court.

In our opinion the constitutional provision on that subject is merely declaratory, and has not altered the pre-existing law regulating the powers of the court and jury in criminal cases.

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With reference to the other views expressed in the opinion of the Chief Justice upon the construction of the act of 1858, as there is a difference of opinion among the members of the court, as to some of them, and their determination is not necessary for the decision of the case, we refrain from expressing our views upon them.

*Judgment reversed.*

(Decided July 20th, 1858.)

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### FREDERICK COWMAN *vs.* THE STATE.

Objections to an indictment, that the act charged against the traverser is no offence within the true meaning of the law under which the indictment was framed, and that the law itself is unconstitutional, are *subjects of demurrer*, and, since the act of 1852, ch. 63, can be raised by a demurrer to the indictment, and in no other way.

#### ERROR to the Circuit Court for Anne Arundel county.

The plaintiff in error was indicted under the same law as the party in the preceding case, the indictment charging that the traverser "within the corporate limits of the city of Annapolis, *did give* a certain quantity of spirituous or fermented liquor, to wit," &c., to a person "who was then and there a minor, under the age of twenty-one years, and who did not then and there have a written order from his, the said minor's, parents and guardian, authorizing the said giving of the said quantity of spirituous or fermented liquor as aforesaid, contrary to the form of the act of Assembly," &c. The plea was *non cul*, and upon the rendition of a verdict of guilty, the traverser moved in arrest of judgment.

1st. Because the evidence in this case clearly showed that the traverser went into a public bar-room, in the city of Annapolis, and invited two minors, under the age of twenty-one years, there present, to drink, which they did, and the traverser paid for what they so drank; that the traverser is not a party

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licensed to sell liquor, and is not engaged in any business of trading in merchandize, and he submits and insists that such an act is no offence, within the true and proper construction of the act of 1858, ch. 55, upon which this indictment is framed.

2nd. Because after the argument of the case before the jury, by the counsel for the traverser, who had argued to them that the act of 1858 was unconstitutional and void, as being in violation of the constitution of this State, the court gave an opinion, and told the jury that the counsel for the traverser had no right to argue to them that said law was unconstitutional, and that the jury had no right to consider the question of its unconstitutionality.

3rd. Because the act of 1858, upon which this indictment was framed, is unconstitutional and void, and no valid judgment can be rendered by the court upon the verdict of the jury in this case.

The court (BREWER, J.,) overruled the motion, and imposed the fine prescribed by the law in question, and to correct this judgment, the traverser sued out the present writ of error.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BARTOL, J.

*Jas. S. Franklin* and *Thos. G. Pratt* for the plaintiff in error, relying upon the same positions in regard to the unconstitutionality of the law, and the right of counsel to argue that question to the jury, as in the preceding case, argued further:

That the traverser in this case not being licensed to sell liquor, and not being engaged in any business of trading in merchandize, was guilty of *no offence*, within the true and proper construction of the act of 1858, ch. 55. The law was intended to apply to those who sold or disposed of liquor in the *way of trade*; the words "whether licensed to sell or not," mean, that where an *unlicensed* party sells in the way of trade, the State shall not be restricted to a prosecution for selling *without license*, but may proceed under this act, which imposes a heavier penalty. The word "*give*," was inserted to prevent

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the evasion of the law, where the proof fails to show a *purchase*. The Sunday law of 1847, ch. 193, uses the general language, "any person or persons," and yet the Court of Appeals have confined its operation to *licensed* tavern-keepers and retailers. *Bode vs. The State*, 7 Gill, 326. The 2nd sec. of that act, relied upon by the court, is analogous to the 8th sec. of this. The court, in that case, also relies upon the *forfeiture of the license* for a second offence. The 2nd sec. of this act also provides for the suppression of the license, and the 4th, 6th and 8th secs. clearly indicate that the act was designed to operate only upon those who traffic in liquor. A contrary construction would lead to *absurd consequences*, which are to be avoided in the construction of statutes. *Dwarris on Statutes*, 756. The mischief and the remedy must be considered, and cases out of the *mischief* are out of the *purview*, though within the *language* of the statute. *Dwarris*, 692, 697, 698, 724. By our constitution, the *title* is made a material part of the act, and where the *text* is doubtful, recourse must be had to the title. The construction must be upon the entire statute, and where different parts conflict, that construction must be adopted which will render them harmonious. 5 *Md. Rep.*, 485, *Alexander vs. Worthington*. *Dwarris*, 699, 700, 739, 762, 763. 3 *Kelly*, (*Geo. Rep.*,) 152, *Ezekiel vs. Dixon*. So much of the act as is not expressed in the title is inoperative and void. 7 *Md. Rep.*, 151, *Davis vs. The State*. 4 *Geo. Rep.*, 38.

*James Revell*, State's Attorney for Anne Arundel county, for the State:

The traverser did not *demur* to the indictment, and the judgment upon it cannot, by the express language of the act of 1852, ch. 63, be "*stayed or reversed*" for "any matter or cause which might have been a subject of demurrer to the indictment." All the objections now urged in behalf of the traverser, in regard to the unconstitutionality of the law, and its non-application to *his case*, even if they were admitted to be valid, as they are not, were subjects of *demurrer* to the indictment, and could only be taken advantage of in *that mode*.

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LE GRAND, C. J., delivered the opinion of this court.

In this case there is no question before us. The traverser did not demur to the indictment. He had the right to have done so, and if he had exercised it, he would have had an opportunity to have shown, if such was the case, that the act charged against him was, in point of law, no crime whatever. Not having demurred, we cannot relieve him, being prohibited from doing so by the positive language of the act of 1852, ch. 63. Its second section declares, "That no indictment or presentment for felony or misdemeanor shall be quashed, nor shall any judgment upon any indictment for felony or misdemeanor, or upon any presentment, whether after verdict, by confession, or otherwise, be stayed or reversed," for certain specified causes, "nor for any matter or cause which might have been a subject of demurrer to the indictment." The matters now invoked in behalf of the appellant, were matters of demurrer, and as no demurrer was interposed, we cannot stay or reverse the judgment.

*Judgment affirmed.*

(Decided July 20th, 1858.)

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## THOS. J. LEE & WIFE, vs. JOHN O. PRICE and the CHESAPEAKE BANK.

An administrator *pendente lite* is responsible to the orphans court so long as he holds the letters, and that court has *adequate powers* to protect the interests of those concerned in the faithful performance of his duties, and a *court of equity* has no right to interfere with him, or with the funds in his hands belonging to the estate.

APPEAL from the Equity Side of the Superior Court of Baltimore city.

The bill in this case, filed by the appellants against the appellees, alleges that Mrs. Lee is the niece and one of the heirs at law and next of kin of Charcille C. D. Owings, who,

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as the complainants believe, died intestate, though a paper purporting to be her will, has been offered for probate by the defendant, Price, to the orphans court for Baltimore city, and having been *caveated*, is now the subject of inquiry as to its validity on issues sent from that court to the Superior court of Baltimore city for trial; that Price obtained letters of administration *pendente lite* on the estate of Miss Owings, from the orphans court for Baltimore county, though the will was never offered for probate in that court, and no controversy touching the same has ever been pending there, and that certificates of deposit for a large amount (\$22,000) issued to Miss Owings by the Chesapeake Bank, and other property of hers have come to his hands, and that Price surrendered those certificates to the bank, and took out others for the same money in his *individual name*, and has obtained from the bank a part of the money for which such new certificates of deposit were issued to him, and has applied it to his own use; that the complainants are apprehensive he will convert and waste the whole of the funds of the estate in his hands during the pendency of the controversy respecting the will, and that the rights and interests of the complainants in the estate may be greatly endangered; and that the complainants are remediless, except in equity. The bill then prays for an injunction restraining Price from using any more of the money, and that what has been used may be replaced, and the bank from paying any more of said money to him.

The injunction which was issued on this bill is directed to Price and the bank, and besides enjoining the payment of any more of the money to Price, and his appropriation of the same to his own use, directs the certificates which have been issued to him to be returned, and the money to be replaced in bank, as the money of the estate.

Price, in his answer, admits the *caveat* to the will, and the pendency of the issues to test its validity, and the grant to him by the orphans court for Baltimore county, after deciding that it had jurisdiction of the matter, of letters of administration *pendente lite* on the estate of Miss Owings, and his possessing himself, in that character, of the certificates of deposit which

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had been issued to her by the bank. He also admits that he demanded payment of said certificates, and redeposited the amount in the same bank in his own name, receiving new certificates therefor, and has since obtained from the bank the amount of one of these certificates, and still retains the others, amounting to \$16,500, and bearing interest, and states that he does not mean to make any use of them, except in due course of administration. He further alleges that his bond as administrator is abundantly ample for the whole personal estate, and denies that there is any ground whatever for apprehension on the part of the complainants, or that they do, in fact, apprehend any danger of ultimate loss. He concludes his answer by excepting to the jurisdiction of the court, on the ground that there is adequate remedy for the protection of all concerned, without resorting to the extraordinary powers of a court of equity, and that such a remedy is afforded by law in the orphans court for Baltimore county, where the duties of an administrator *pendente lite* may be enforced summarily and effectually, and at small cost.

The answer of the bank agrees with that of Price, as to the issue of the original certificates of deposit to Miss Owings, Price's demand of the amount of them, as administrator *pendente lite*, and his surrender of the old, and reception of new certificates in his own name for the amount, one only of which has been cashed for him, the rest being still outstanding.

Both answers being filed, Price moved for a dissolution of the injunction, and the complainants then asked for a commission to take testimony, which was issued accordingly, and evidence taken thereunder, which does not change the state of facts averred in the answer, and, therefore, need not be repeated. The motion to dissolve was then heard, and the court (LEE, J.,) dissolved the injunction, and from the order of dissolution the complainants appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BARTOL, J.

No counsel appeared for the appellants.

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*J. Mason Campbell* for the appellees:

1st. The writ that issued was manifestly wrong, and merited the fate it received. It not only restrained the defendants from further payments, but actually ordered them to put back the money already paid, and left nothing whatever to be done by a final decree. It was, in effect, a final decree as to the whole controversy, and ended the case. *Drury on Injunctions*, 200.

2nd. In regard to the moneys payable to Price by the bank, on the certificates, it was unnecessary to come into chancery, when the orphans court of Baltimore county could have, at once, ordered the money into court, either *ex officio* or on application. *Act of 1831, ch. 315, secs. 4 to 7.* That court had abundant power to accomplish every thing desired by this bill, and there was, therefore, no necessity for going into equity. 3 *Md. Rep.*, 454, *Cain vs. Warford*. 3 *Bland*, 184, *Hewitt's Case*. 8 *G. & J.*, 226, *Alexander vs. Stewart*. 10 *Simons*, 327, *Jones vs. Goodrich*, (note 1.)

TUCK, J., delivered the opinion of this court.

The bill of complaint does not state a case authorizing a court of equity to interfere with the appellee, Price, or with the funds in his hands, belonging to the estate, in the manner proposed by the complainants. He must be treated as administrator *pendente lite*, appointed by a court of competent jurisdiction, and responsible to that tribunal so long as he holds the letters of administration. *Raborg vs. Hammond*, 2 *H. & G.*, 42. *Alexander vs. Stewart*, 8 *G. & J.*, 226. The powers of the orphans courts, under the acts of Assembly, are adequate to the protection of the interests of those concerned in the faithful performance of the duties of the appellee, as administrator, whilst his official bond affords indemnity for any loss that may occur. If the bond be insufficient, another may be required. We have decided the case upon the bill, without reference to the circumstance that the answer denies the allegations that the funds of the estate have been, or will be, wasted or misapplied by the administrator. See the act of 1831, ch. 315.

*Order affirmed.*

(Decided July 20th, 1858.)

THE BALTIMORE AND OHIO RAIL ROAD COMPANY,  
vs. WILLIAM LAMBORN.

At common law a plaintiff cannot recover for injuries to which his own fault or negligence directly contributed, and this principle is *not changed* by the acts of 1838, ch. 244, and 1846, ch. 346, in relation to the liability of rail road companies in this State, for injuries to cattle and stock on their roads.

Under these acts, rail road companies are bound to show that the damage was the result of inevitable accident *only* in cases where the party complaining has not contributed in any manner, by his own negligence or violation of law, to the injury complained of.

The owner of cattle is bound to keep them in an enclosure or in custody at *his peris*, for every entry by them on another's possession is a *trespass*, and this principle applies as well to the intrusion of cattle and horses, upon the land over which a rail road company is entitled to its franchise as to the property of a private owner.

The acts of 1838, ch. 244, and 1846, ch. 346, give a right of action to the owner of stock, killed or injured on a railway, *only* when such stock is on the railway *without any fault on the part of the plaintiff*.

APPEAL from the Circuit Court for Howard county.

*Trespass on the case*, brought by the appellee against the appellant, to recover the value of a horse belonging to the plaintiff, killed by the locomotive of the defendant. Plea *non cul.*

*Exception.* The facts of the case, as given in evidence, are fully stated in the opinion of this court. The defendant asked four instructions, in substance as follows:

1st. If the jury believe from the evidence, that the plaintiff's horse was injured by the locomotive of the defendant, under charge of its agents, and that the horse was on the track of the rail road through any negligence on the part of the plaintiff to keep the horse within his close, the plaintiff is not entitled to recover.

2nd. If the jury believe from the evidence, that the plaintiff's horse was injured by the locomotive of the defendant under the management and control of its agents, and that, at the time of such injury, the horse had strayed upon the track of the rail road through the want of fences which the plaintiff

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was bound to erect, the plaintiff is not entitled to recover, though, at the immediate time of the injury being done, the defendant was guilty of actual negligence.

3rd. If the jury believe from the evidence, that the plaintiff's horse was injured by the locomotive of the defendant, under the management and control of its agents, and that the horse had strayed upon the track of the rail road through any defect in the fences or enclosures of the plaintiff, then the plaintiff is not entitled to recover.

4th. If the jury believe from the evidence, that the plaintiff's horse was killed on the rail road, by being run over by a locomotive under the control and management of the defendant's agents, and that the horse was upon the track of the rail road without any fault or negligence of the defendant, then the plaintiff is not entitled to recover, he being bound to keep the horse upon his premises and within his enclosures.

These instructions the court, (BREWER, J.,) refused to give, and to this ruling the defendant excepted, and the verdict and judgment being in favor of the plaintiff, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*Thomas Donaldson* for the appellant:

1st. The injury complained of would not have happened, but for the negligence of the plaintiff in permitting his horse to stray at large in the neighborhood of the rail road. The well settled principle of the common law, that a plaintiff is not entitled to recover for injuries to which his own fault directly contributed, is not abrogated or even modified by the acts of 1838, ch. 244, and 1846, ch. 346. The sole effect of these acts, is to throw upon the defendant the burden of proof in regard to the absence of negligence on his part, leaving the question of the effect of the negligence of the plaintiff, exactly as it stood under the common law. *4 Md. Rep., 242, Balto. & Susq. Rail Road Co., vs. Woodruff.* 14 Barb., 364, *Marsh vs. New York & Erie Rail Road Co.* 3 Kernan, 42, *Corwin vs. New York & Erie Rail Road Co.* 13 Georgia, 68,

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*Macon & Western Rail Road Co., vs. Davis.* Any other construction of these acts would not only be unreasonable, and would subject rail road companies to the grossest imposition, and the travelling community to imminent hazards, but would be an invasion of constitutional rights.

2nd. Every owner of cattle is bound to keep them within his own close; if they stray upon the rail road they are trespassers, and the owner is himself the cause of any injury suffered in consequence. The acts of Assembly referred to cannot reasonably be so construed as to give a right of action, except in cases where the cattle are rightfully crossing the track as when driven on a highway. *4 Exch. Rep.*, 580, *Sharrod vs. London & North-Western Railway Co.* *5 Denio*, 255, *Towanda Rail Road Co., vs. Munger.* *11 Barb.*, 112, *Clark vs. Syracuse & Utica Rail Road Co.* *19 Penn. State Rep.*, 298, *Rail Road Co., vs. Skinner.* *1 Foster*, 363, *Towns vs. Cheshire Rail Road Co.* *2 Zabriskie*, 185, *Vandegrist vs. Rediker.* *2 Mich.*, 259, *Williams vs. Michigan Central Rail Road Co.* *6 Barr.*, 472, *Knight vs. Abert.*

3rd. It is gross negligence for the owner of cattle, to suffer them to go at large in the vicinity of a rail road. *14 Barb.*, 364. *13 Barb.*, 497, *Talmadge vs. Renssalaer & Saratoga Rail Road Co.*

*Wm. H. G. Dorsey* for the appellee:

There is no evidence in the record of any negligence on the part of the plaintiff, and under the acts of 1838, ch. 244, and 1846, ch. 346, the plaintiff was entitled to recover, unless the defendant could show the injury to the horse to be the result of unavoidable accident.

*BARTOL, J.*, delivered the opinion of this court.

This is an action to recover the value of a horse, belonging to the appellee, killed by the locomotive of the appellant.

At the trial of the cause, the plaintiff, to maintain the issue on his part, proved that some time in the month of September 1855, he was the owner and proprietor of certain land adjoining and contiguous to the Washington branch of the Baltimore

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and Ohio Rail Road, at or near the Hanover switch, where the cars of the defendant stop, when necessary, to put off or take up passengers, and that he was also the owner of a horse which, at the time referred to, was standing at or near the point indicated, on the line of the said rail road, though not immediately in the track, and which was run over by the cars of the said defendant, and so injured as to be entirely lost to the said plaintiff.

The defendants, then, for the purpose of maintaining the issue joined on their part, proved that on the occasion of the injury to the horse of the plaintiff, a locomotive, with a train of passenger cars attached, in charge of their agents, was proceeding from Baltimore to Washington, at a rate of speed of about twenty-five miles an hour, that on approaching the switch they gave the usual and ordinary signal, with the whistle; that when within a short distance of said Hanover switch, they observed the horse of the plaintiff, distant some hundred and fifty yards, standing near the rail road track, and on or near a road which crosses said track; that immediately upon observing the horse, the whistle was sounded to put down the brakes, and the brakes were put down instantly; that the horse immediately took to the track of the rail road, and run some distance in the road, when he was overtaken by the cars and run over; that at the time of the collision, the speed of the cars had been reduced to some ten miles the hour. It was further proved, that if the agents having charge of the cars, had, at the time of the discovery of the horse, when they were going at the rate of twenty-five miles an hour, reversed the engine, it would have been at the peril of the entire train and passengers, as, in all probability, it would have thrown the cars from the track.

The plaintiff then proved, upon cross-examination, that the point where the horse was first seen, was a point on the rail road which, from the curve in the road, could not be seen at a greater distance than a hundred and fifty yards, and that carts and wagons are frequently passing said rail road during loading and unloading iron ore, to be transported over said rail road; and that it would have been impossible to arrest the

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cars, going at the rate at which they were travelling, when they first discovered the horse, sufficiently to avoid the collision.

Whereupon the defendant offered four prayers, which were rejected by the court below, and the verdict and judgment being in favor of the plaintiff the defendant appealed.

In all the prayers the principle is involved, that if the horse, when killed, was upon the track of the rail road, *through the negligence of the plaintiff in not keeping the horse within his close*, then he is not entitled to recover.

It is a principle of the common law, too well settled to require authorities to be adduced in its support, that, in an ordinary case, a plaintiff is not entitled to recover for injuries to which his own fault or negligence directly contributed; but it is contended by the appellee's counsel, that this case is freed from the operation of that principle, by force of the provisions of the acts of Assembly of 1838, ch. 244, and 1846, ch. 346.

The former of these acts was carefully considered, and its construction settled by this court, in the case of *The Baltimore & Susquehanna Rail Road Co., vs. Woodruff*, 4 Md. Rep., 242.

It was then decided that "the act simply changes" the rule of evidence, by releasing the plaintiff from proving negligence, if the fact of the *injury* is established, and casts the *onus* upon the defendant of showing there was no negligence" on its part. In other respects, the rights of the parties and their liabilities at the common law, remained unchanged by the act of 1838.

The act of 1846, ch. 346, while it leaves the *onus* of proof where the act of 1838, had placed it, on the defendant, requires that the rail road company shall, in order to exempt itself from responsibility, prove "that the damage or injury sustained, was the result of unavoidable accident."

This court, in construing the act of 1838, said, that it restored the common law rule in relation to negligence, and imposed on the company the duty of showing the exercise of reasonable care and caution; See 4 Md. Rep., 256. The language of the act of 1846 is somewhat different, and must be construed as imposing on the company the highest degree of care and caution; by its terms nothing can exempt the company, but to show that the damage complained of was the result of *unavoidable accident*.

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But, in our opinion, this applies only to those cases where the party complaining has not contributed in any manner by his own negligence or violation of law to the act complained of. Or in other words, the rule of the common law to which we have adverted, remains unchanged by the acts of Assembly to which we have referred. And we concur in the views taken by the appellant in his argument, that any other construction of these acts, would subject rail road companies to the greatest imposition and expose the lives of passengers to the most constant and imminent peril. In the language of Chief Justice Gibson, in 19 *Pa. State Rep.*, 302, "A rail road company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the greatest attainable rate of speed, with which neither the person nor the property of another may interfere. The company on the one hand, and the people of the vicinage on the other, attend respectively to their particular concerns, with this restriction of their acts, that no needless damage be done. But the conductor of a train is not bound to attend to the uncertain movements of those loitering or roving cattle by which our railways are infested. Any other rule would put a stop to the advantages of railway travelling altogether." To the same effect see *Clark vs. Syracuse & Utica Rail Road Co.*, 11 *Barbour*, 112. *Marsh vs. The New York & Erie Rail Road Co.*, 14 *Barbour*, 364, and the other cases cited by the appellant in the argument.

"By the common law, an owner of cattle is bound to keep them in an inclosure or in custody at his peril, for every entry by them on another's possession is a trespass," and this is the law of Maryland, and applies as well to the intrusion of cattle and horses upon the land over which a rail road company is entitled to its franchise as to the property of a private owner. And the construction which we put upon the acts of Assembly of 1838 and 1846, is, that they give a right of action, only where the cattle, horses, &c., of the plaintiff, are on the railway, without any fault on his part. And the question of the negligence or fault of the plaintiff, in the case before us, was a

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proper subject to be passed upon by the jury. That question was properly presented by the several prayers of the defendant, and the circuit court erred in rejecting them.

*Judgment reversed and procedendo awarded.*

(Decided July 20th, 1858.)

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### THE STATE *vs.* ALBERT REED, (free negro.)

Alleged defects in an indictment as to *venue*, (the margin, however, showing that the court had jurisdiction,) and because it failed to designate the prisoner as a *free* negro, and stated his given name incorrectly, and concluded by charging the murder to have been committed by the *murdered man*, instead of the *prisoner*, are all *subjects of demurrer*, and, since the act of 1852, ch. 63, a *valid* judgment upon a verdict of *guilty* on such an indictment, the prisoner *not demurring*, could have been entered, and such judgment could not have been stayed, *arrested*, or *reversed*.

A trial upon such an indictment is not, therefore, a *mistrial*, so as to enable the State to proceed anew upon another indictment, and the jury having rendered a verdict of "*not guilty*, by reason of the insufficiency of the indictment," the plea of *autrefois acquit* is a bar to a *second* indictment for the *same crime*.

#### ERROR to the Circuit Court for Cecil county.

The record in this case shows that the defendant in error was indicted in Kent county, on the 12th of November 1856, under the name of *Alfred Reed*, for the murder of George Vansant. The indictment, containing two counts, commences: "State of Maryland, Kent county, sc<sup>t</sup>. The jurors of the State of Maryland, for the body of Kent county, do, upon their oaths, present that *Alfred Reed*, laborer, of Cecil county, on the 23rd of June 1856, in the *county aforesaid*," and then after describing the nature of the assault with a deadly weapon, made feloniously, wilfully, and of malice aforethought, by the said *Alfred Reed* upon the said George Vansant, the wound and death, concludes each count thus: "And so the jurors aforesaid, upon their oaths aforesaid, do say that the said *George Vansant*, him the said *Alfred Reed*, in the manner

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and form aforesaid, then and there feloniously, wilfully, and of his malice aforethought, *did kill and murder, against,*" &c.

Upon the suggestion of the prisoner, the case was removed to Cecil county for trial, and at the April term, 1857, of the circuit court for that county, the prisoner pleaded *not guilty*, and a jury was then empanelled, and the trial was commenced and proceeded with until the evidence on the part of the State was closed. At this stage of the trial the attorney for the State moved to *quash the indictment*, 1st, because it charges the prisoner by the name of *Alfred Reed*, when his name is *Albert Reed*; 2nd, because it does not charge that the prisoner is a *free negro*; 3rd, because it charges that the murder was in Cecil county, instead of Kent county, in which it was really committed; and 4th, because the indictment concludes by charging that George Vansant murdered *Alfred Reed*, when it should have charged that *Albert Reed* murdered George Vansant. The record then states, that it appears to the court that the indictment is insufficient and erroneous, but because a jury had been empanelled and the case, by examination of witnesses, had been proceeded with until the evidence on the part of the State was closed, it ought not to be quashed, but a verdict of "not guilty, by reason of the insufficiency of the indictment," be rendered, and the jury thereupon rendered a verdict "that the said *Alfred Reed*, free negro, is not guilty, by reason of the insufficiency of the indictment," and the prisoner was then committed to the custody of the sheriff of Cecil county, to await the action of the grand jury of Kent county.

A second indictment was then found by the grand jury of Kent county, against the prisoner, charging him, in due form, under the name of *Albert Reed*, free negro, with the *wilful* murder of *George L. Vansant*, committed in Kent county. This indictment, also, upon suggestion of the accused, was removed to Cecil county, and when the case was there called for trial, the prisoner, by his counsel, filed a plea of *autrefois acquit*, setting forth in full the proceedings under the *first* indictment, and averring that *Alfred Reed*, mentioned therein, is the same person as *Albert Reed*, charged in the present indictment, and that the felony and murder mentioned in the

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two indictments, is one and the same offence. To this plea the State *demurred*, but the court (PRICE, J.,) overruled the demurrer, sustained the plea, and discharged the prisoner. To correct this judgment the present writ of error was sued out by the State.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BARTOL, J.

Geo. Vickers, for the State, argued that the first indictment was legally insufficient to warrant a judgment upon a verdict of guilty:

1st. Because it does not charge that the prisoner was a free negro. The color of the accused was *prima facie* evidence of slavery. If a slave, the owner, upon conviction, would be entitled to compensation. If convicted of manslaughter, as a free negro, he would be subjected to penitentiary imprisonment; if as a slave, he might be sold and banished; if tried without any addition, it would be as a freeman, and he would be punished accordingly, if convicted. The act of 1852, ch. 63, provides against *quashing* an indictment for the omission or misstatement of the "*title, occupation or degree* of the defendant," but none of these apply to a free negro, who has no title or degree, in a technical sense, but his condition of freedom or slavery is essential to be known before trial and conviction.

2nd. Because there was error in laying the *venue* of the murder in Cecil, instead of Kent county. That such is the meaning of the words "*county aforesaid*," in this indictment, is clear. *Matthews on Presumptive Evidence*, 269, and authorities there cited. Unless this defect is cured by the act of 1852, ch. 63, the objection must be fatal. The language of the act is, that no indictment, &c., shall be quashed, &c., "for want of a proper or perfect *venue*, when the court shall appear, by the indictment, &c., or by the statement of the *venue* in the *margin* thereof, to have had jurisdiction over the offence." This language seems comprehensive, but the statute is to be construed strictly, and we do not think it bears a *latitude* interpretation. The words in the *margin* can have

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no more force than the words in the commencement: "The jurors of the State of Maryland, for the body of Kent county." It is the place where the offence is committed that confers jurisdiction, and that place, in this indictment, is designated Cecil county. How, then, can the statement of the county, as a *videlicet*, where the indictment is found, make it appear that the court had jurisdiction? That *marginal* entry cannot explain or point to the locality where the offence was perpetrated. It can refer to nothing but the county where the indictment originated, and which is explicitly stated in the body of it. No aid is furnished by the margin to show where the crime was committed, nor are there any words in the body of the indictment capable of making such reference or explanation.

3rd. Because the indictment contained no charge of murder against the prisoner, but imputed to the deceased the murder of the accused. The error was probably made in transcribing the indictment. The mistake is, however, apparent and fatal. It may be attempted, by a change of words, and of case, to convert the conclusion into a charge of murder against Reed, but such a construction must be forced and unnatural. The conclusion of the count, which is essential to its integrity and perfection, is, "that the said George Vansant, him, the said Alfred Reed, in manner and form aforesaid, then and there feloniously, wilfully, and of his malice aforesought, did kill and murder." These words, in the order used, and in precisely the same connection, are copied from the form of an indictment in *Wharton's Cr. Prec.*, 42, and are technically and grammatically correct, with the exception of a misplacing or transposing of the names of Reed and Vansant. There is no authority to interpolate and change words to help a charge imperfectly and erroneously laid. Nor can this averment be omitted; it is vital to the charge of murder. Every indictment in the books sets it forth in that phraseology. The statement describes the character of the wound, its mortality, and the circumstances and intent with which it was inflicted, but the legal nature and character of the offence are contained only in the *conclusion*, which gives a legal form and definite name to the crime. It is the only portion of the indictment

that uses the word “*murder*,” a term of art which no other word in the language can supply, and indispensable to the existence of the charge. 1 *Russell on Crimes*, 470. *Starkie's Cr. Pl.*, 96, 231. 1 *East's Crown Law*, 345, sec. 116. *Wharton's Cr. Law*, (4th Ed.) 399. The crime is charged by way of conclusion, and as a consequence from the antecedent matter positively alleged. 1 *East's Crown Law*, 347, sec. 117. A verdict on an indictment is “guilty in manner and form as by the said indictment,” &c. 1 *Arch. Cr. Pl.*, 193.

4th. Because the indictment was insufficient to sustain a charge of manslaughter. Manslaughter is an inferior grade of homicide, (1 *Hale*, 438,) and its definition, in *Matthews' Cr. Dig.*, 234, sec. 3, is: “The unlawful and felonious killing of another without malice, either express or implied.” The conclusion of an indictment for manslaughter is, “feloniously, wilfully and unlawfully did kill and slay.” *Wharton's Cr. Prec.*, 83, 84, 85. The words “kill and slay,” are the technical terms used to define the character of manslaughter, as “*murder*” with “malice aforethought” are essential to the offence of the highest grade. An indictment for manslaughter never contains an allegation that the blow was struck “with malice aforethought,” because such terms would describe a crime of greater magnitude. These words are essential to a count for murder, and repugnant to one for manslaughter. They are employed in this indictment, and cannot be rejected as surplussage, or stricken out by any authority except that of the court, in the presence of the grand jury, who pronounced the “true bill.” 1 *East's Crown Law*, 347, sec. 116. On an indictment for murder, a party may be convicted of manslaughter, but in the rendition of the verdict, the jury must negative the charge of murder, or the verdict would be erroneous. 6 *Md. Rep.*, 167, *State vs. Flannigan*. But this indictment was obviously intended to be for murder, and cannot be converted into an indictment for manslaughter, and held sufficient for a verdict upon the single question of manslaughter, without referring to the question of acquittal of the highest offence.

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The point raised below, by the counsel for the accused, and on which they mostly relied, was, that since the act of 1852, ch. 63, the court, upon a conviction upon the erroneous indictment, must have pronounced judgment against him, as that act prohibited a motion in arrest of judgment for any cause which might have been a subject of demurrer to the indictment. The argument, in effect, was, that though a murder might be alleged which was *impossible*, the punishment must follow in all its severity. The court will perceive that this act was framed to prevent accused parties from moving in arrest of judgment for material defects in indictments, of which they were cognizant, who, preferring the chance of escape under a trial and verdict, declined making a motion till after conviction by the jury, after the time of the court had been consumed, and further delay made necessary upon a successful effort to arrest judgment, thus increasing the expense and affording a contingency of escape from delay and the absence or death of witnesses. 6 *Md. Rep.*, 406, *Cochrane vs. The State*. It appears plain to our mind, from the reading of this statute, that it has exclusive reference and application to defendants. It declares that no arrest of judgment shall be had for any matter that might have been a cause of demurrer. As a demurrer to an indictment is a remedy exclusively belonging to defendants, and as the subjects specifically enumerated in the law as "venue," "degree," "force and arms," &c., are the peculiar subjects for demurrer, the scope, design and spirit of the law are applicable to omissions by defendants to avail themselves of the provisions of the act on motions to quash, or by demurrer. The law was evidently intended to disentangle the State, and prevent unnecessary delay, by preventing technical and refined objections, unless introduced and made prior to trial, when new indictments might be found, obviating the objections made to the first. There must be some limitation to the terms used in the law. Suppose, in this case, the indictment had concluded by charging that Reed had murdered himself, or some other person whose name, *idem sonans*, was like Vansant's, and the error had remained undiscovered till after verdict, could the court enter judgment upon such find-

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ing? The verdict would be absurd, and a judgment upon it would be equally so. No such indictment could place any one in jeopardy. It is not to be presumed the Legislature would enact a law that would work out such preposterous results. The supposed cases are not more absurd than the error which was inadvertently made in this indictment. If we are correct in our interpretation of the law, it follows that if Reed had been convicted, no judgment could have been passed upon him. In *2 Hale*, 248, it is said, the judges are bound to look into the indictment, and their judgment shall be supposed to be given upon the defect. In the present case, the opinion of the court to the jury, and the verdict, were given expressly upon the ground of an insufficient indictment. This principle is recognized in *State vs. Sutton*, 4 *Gill*, 494, and *Black vs. State*, 2 *Md. Rep.*, 376.

5th. The plea of *autrefois acquit* cannot avail the defendant. His life has not been placed in jeopardy in a legal sense; the first was a *mistrial*, and he can be tried on the second indictment. *2 Hale*, 248. *2 Hawk.*, 515, ch. 35, sec. 1. *Ibid.*, 517, sec. 3. *Ibid.*, 521, sec. 8. *1 Johns.*, 66, *People vs. Barrett & Ward*. *1 Arch. Cr. Pl.*, 111, 112, note 2. *Wharton's Cr. Law*, (*Ed. of 1857.*) secs. 555, 556, 573, 587. A verdict of guilty on the merits, would have been in manner and form as charged in the indictment, which charge was of an impossible thing. The verdict would have been insensible, and the court could not have entered a judgment upon it. *Wharton*, (*Ed. of 1857.*) sec. 3034.

E. F. Chambers and Alex. Evans for the defendant in error:

1st. The omission to charge the prisoner to be a free negro, is no valid objection to the indictment. The argument for the State admits that the traverser, "if tried without any addition, would be tried as a freeman, and punished accordingly." It is, therefore, precisely the same in substance and effect as if he was charged in the indictment as a "free negro." Where, then, is the error? There is no ground for this point, even before the act of 1852, ch. 63, and it is respectfully suggested that there certainly can be none since.

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2nd. As to the *venue*. It is unnecessary to do more than refer the court to the 2nd section of the act of 1852, ch. 63, the clear meaning of which is, that where either the margin or the body of the indictment shows that the court taking jurisdiction is the proper tribunal before which the offence should be tried, no such indictment shall be quashed, nor shall advantage be taken of it after verdict. The proper court will, of course, be known on *proof* of the place during the trial, and it is not denied here that the place relied on in the proof is in the county in which, as appears by the body of the indictment, the jury found the indictment. It is alleged to be the work of the jurors for the body of Kent county.

3rd. It is urged that the indictment does not charge the prisoner with murder, but imputes to the deceased the murder of the accused. In answer to this objection, it is necessary to refer to the grammatical construction of the words of the indictment: "That the said George Vansant, him the said Albert Reed, in the manner and form aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder." This, *standing by itself*, is an ambiguous sentence. It may mean that Reed murdered Vansant, or that Vansant murdered Reed, with equal grammatical propriety. The context, and subject matter, and preceding words are to be looked at and examined, and they divest it of ambiguity. The court will read it, without regard to punctuation, so as to make it speak sense, and not nonsense. Many instances might be given to show that the word "him," after "Vansant," is referable to the word "Vansant," which precedes. The expression is, "Vansant, him, the said Albert Reed did kill." Him. Who? Why "him, Vansant, Albert Reed did kill." There would seem, therefore, nothing, when the subject, the context and the preceding allegations are considered, to make this so clear a charge of killing Reed by Vansant, as to say that there had been no peril on the part of the prisoner, who actually went to the jury, and had a verdict of acquittal. Was not, then, the indictment sufficient for murder?

4th. But admitting, for the sake of the argument, that the indictment was not sufficient for murder, still it is plain that it

was sufficient for manslaughter. The word "murder" is essential to an indictment for the crime of murder; that word is placed in indictments at the end, after the words "and so the jurors aforesaid," &c.; properly alleged, it might be anywhere else; if omitted, the indictment is for manslaughter only. *Foster's Crown Law*, 424. *Hale*, 186. This indictment contains all that is necessary in manslaughter, without including the words "and so the jurors aforesaid," &c.; the felony and killing are all set out. The counsel for the State thinks there could be no conviction of manslaughter, because the malice aforethought is set out; but this is the case in every indictment for murder, and yet convictions for manslaughter are constantly found upon them, and that without any erasure. The case where the grand jury ignore for murder, and find for manslaughter, is not this case; there it is necessary to strike out the words "murder" and "malice aforethought," because it is not proper to subject the prisoner to a chance of greater punishment than the grand inquest designed.

5th. But assuming all or any one of the points above argued to be established in favor of the State, we then hold it beyond successful controversy, that the act of 1852, ch. 63, must be an effectual bar. It is said this act was made to prevent accused parties from moving in arrest of judgment for material defects "of which they were cognizant." Cognizant when? The law presumes even accused parties to be informed of its provisions; much more must it presume learned counsel so to be. And how is the court to ascertain the *fact* of the party's knowledge, or that of his counsel, or *when* they became informed? Certainly the statute had reference to defendants, in so far that if there be a demurrer to the indictment, it must be filed by the defendant. But it is a great mistake to say the act has exclusive reference to defendants. It secures to the State not only exemption from the costs of prosecutions defeated by setting up defences after verdict, which could have been made by demurrer, but it also secures to the State the more important object of punishment inflicted on a party who is guilty, in fact, of the crime for which he is prosecuted, though not guilty according to the technical niceties of the common law. And

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this is the great and leading object of the act. It is not denied that the errors in the indictment, if they exist, as alleged by the State, are such as could have been properly demurred to. On the contrary, the whole argument for the State is designed to show these errors to exist, and to be gross and substantial. The act of 1852 emphatically declares, that in such a case the party, if he suffers a trial and is convicted, shall be sentenced and punished. If, therefore, the first trial had progressed, and the jury had found a verdict of guilty, this defendant in error would have suffered the penalty of the law. No motion in arrest of judgment would avail. How, then, is it possible to maintain he was in no peril on the first trial? A prisoner on trial before a jury, on whose verdict depends his chance for life or for death, in no peril? It seems to us so plain a proposition in itself, as not to admit of explanation. If, then, he was acquitted by the jury which could have convicted him, the precise case occurred in which the plea of *autre fois acquit* was peculiarly proper. After the repeated expositions of this statute by this court, in the several cases cited, it is deemed useless to add one word as to its application to such a case as the present. These cases are 6 *Md. Rep.*, 400, *Cochrane vs. The State*; 9 *Md. Rep.*, 21, *State vs. Phelps*; and 10 *Md. Rep.*, 431, *Kellenbeck & Brash vs. The State*.

LE GRAND, C. J., delivered the opinion of this court.

This appeal, we think, is conclusively settled by the second section of the act of 1852, chapter 63. If the prisoner had been found guilty on the trial under the first indictment, the only inquiry would have been, whether judgment could be entered upon the verdict of the jury? If a valid judgment could have been entered, then it was not what is technically known as a *mistrial*, which would enable the State to proceed anew under another indictment, and this being so, of course any motion in arrest of judgment would have been properly overruled. The question, then, is: Why was not the finding of the jury such as to authorize the court to award judgment? To this inquiry it is answered, the indictment was defective in several particulars, first, in its allegation of *venue*; second, in

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its failure to designate the prisoner as a *free negro*; third, because it charged "that the said George Vansant, him the said Albert Reed, in the manner and form aforesaid, then and there feloniously, wilfully, and of malice aforesought, did kill and murder," &c.; and fourthly, that the given name of the prisoner was incorrectly set out. Whatever may be the true philology of the averment as to the killing; that is, whether the words impute the crime to Reed or to Vansant, cannot be matter of importance in the posture of the case before this court. For, were it conceded that each and every of the objections urged by the State against the sufficiency of the indictment was well taken, they could not avail, and for the plain reason, because the law of the State says they shall not.

The act of 1852, chapter 63, expressly declares, "That no indictment or presentment for felony or misdemeanor shall be quashed, nor shall any judgment upon any indictment for any felony or misdemeanor, or upon any presentment, whether after verdict, by confession, or otherwise, be stayed or reversed for want of a proper or perfect *venue*, when the court shall appear, by the indictment, inquisition or presentment, or by the statement of the *venue* in the margin thereof, to have had jurisdiction over the offence, nor for the omission or misstatement of the title, occupation or degree of the defendant," \* \* \* \* \* "nor for any matter or cause which might have been a subject of demurrer to the indictment." Now it is clear that each and every of the objections urged against the first indictment, was "*matter or cause which might have been a subject of demurrer*," and the prisoner electing not to demur, but to go to trial on the issue of not guilty, if the jury had returned a verdict of guilty against him, the judgment on such finding could not have been "*stayed or reversed*." The law pointed out the mode in which he was to take advantage of the defects in the indictment; if he failed to avail himself of it, the verdict of the jury was conclusive against him, and, if so, there would be no *mistrial*; and if no *mistrial*, then he is not liable to be tried again for the same crime. See, also, *The State vs. Buchanan*, 5 H. & J., 329.

(Decided July 20th, 1858.)

*Judgment affirmed.*

**NEGROES CHARLES and others, vs. DIONYSIUS SHERIFF, Exc'r of H. H. WARING, and others.**

Negroes manumitted by a will have the right to file a bill in equity, asking that court to marshal assets, in order to procure proper evidence to enable them to prosecute their petition for freedom, and to decide whether the real estate is charged with the payment of debts in favor of the bequest of freedom, and on such a bill are entitled to an injunction, restraining the prosecution of their petition for freedom, and the executor from paying pecuniary legacies, and judgment creditors from selling them under execution, until these questions are settled.

It is no objection to such a bill for an injunction that it is not verified by *affidavit*, the negroes being incapable of making such an affidavit, and the production of an authenticated copy of the will being sufficient; it is not indispensable in *all cases*, that a bill for an injunction should be sworn to; all that is required is, that the confidence of the court should be obtained, and this may be had on documentary evidence as well as on affidavit.

Nor is it any objection to such a bill that no *injunction bond* was tendered, for no bond could be tendered until the court fixed the amount of the penalty, and if the court had granted the injunction, it would have done so, on condition that a prescribed bond should be first filed.

**APPEAL from the equity side of the Circuit Court for Prince Georges county.**

This appeal is taken from an order of the court below refusing to grant an injunction upon a bill filed by the appellants.

The record shows that Henry H. Waring, by his will, executed on the 28th of May 1853, and admitted to probate, on the 22nd of August 1854, devised and bequeathed as follows: "After my debts and funeral charges are paid, I devise and bequeath as follows: *Item.* It is my will and desire that at my death all my slaves, as follows, Charles, Sylvester, William, Hanson, Albert, Washington, Laura and Henry, shall be free, and that my executors hereinafter named, shall immediately after my death remove them from the State of Maryland to the District of Columbia, or some free State, and make the necessary provisions out of my personal estate, for their comfortable support for the space of twelve months from my death. *Item.* I will and desire, that immediately after my death, my executors hereinafter named shall sell the farm on which I now reside called Waring's Lot, and the money arising

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ing from the sale, I will and devise shall be applied to the payment of the following legacies," viz., legacies of various *sums of money* to different named relatives. "Item. I give, devise and bequeath, all the rest and residue of my estate both real and personal, to be equally divided between my four nieces," (naming them,) "and my two nephews," (naming them,) "in equal portions share and share alike." He then appoints two executors, one of whom is the appellee, Sheriff, to whom letters testamentary were granted by the orphans court, on the 24th of August 1854.

On the 10th of April 1858, the negroes thus manumitted by this will, filed their bill in the present case against the executor, the pecuniary and residuary legatees under the will, and also against certain persons named in the bill, as *judgment creditors* of the testator. The object of the bill was to obtain an injunction, to restrain the further trial of a petition for freedom, instituted by the complainants, and then in progress of trial, and also to restrain certain of the judgment creditors from selling the complainants then levied on under executions, and that the assets of the estate may be marshalled, and the respective rights of the several parties interested adjudged, so as to enable the complainants, on the trial of their petition for freedom, clearly to establish the true condition of the estate and their relation to it. The allegations of this bill are sufficiently stated in the opinion of this court. There was *no affidavit* to it, and no injunction bond tendered or filed. The court below, (*Crain, J.*.) refused to grant the injunction prayed for, being of opinion that the bill did not make "such a case as will justify a court of equity to interfere and delay the creditors in the payment of their just debts." From this refusal the complainants appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*Daniel C. Digges and Thos. G. Pratt* for the appellants:

1st. The case, as made by the bill, was a fit case for the interposition of a court of equity. In the case of *Cornish vs.*

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*Wilson*, 6 *Gill*, 299, it was clearly decided, that slaves manumitted by a will, have the right to file a bill in equity, for the purpose of having the assets marshalled, in order to obtain evidence in the trial of their petitions for freedom that their manumission was not in prejudice of creditors, and also to have the aid of that court in determining whether the real estate has been charged with payment of debts to their exoneration. The right of such parties to proceed in equity, is also sustained by the case of *Peters vs. Van Lear*, 4 *Gill*, 249. These cases then have decided, that *manumitted negroes* may file a bill in equity, for an injunction to restrain creditors and the executor from selling them to pay debts, until the true condition of the estate is determined. Such a bill need not be supported by the affidavit of the complainants, for such complainants can make no *affidavit*, and this was the well known law when the decisions above referred to were made. Nor could they give an injunction bond, nor is such bond necessary. All that a court of equity requires in order to grant the writ is, that sufficient proof be tendered to satisfy the court of the propriety of its action, and this may be done by documentary proof as well as by affidavit. 3 *Bland*, 162, *Salmon vs. Claggett*. 1 *Bland*, 180, *Jones vs. Magill*. *Alexander's Ch. Pr.*, 80, 81. The will which was produced and filed as an exhibit with the bill, clearly showed the manumission of the complainants, and the grounds upon which their claim for relief was based. The bill therefore having been properly filed, it is insisted, that the complainants are entitled to the relief asked for thereby.

2nd. Because the testator clearly intended, that in no event should the complainants be sold as slaves to pay his debts, as he charges his personal estate for their support as free persons, and as, by the residuary clause of the will, he manifestly supposed that his other personal property and land would be more than enough to pay debts and his pecuniary legatees. 2 *Wms. on Excrs.*, 1448. 1 *Merivale*, 229, *Bootle vs. Blundell*.

3rd. Because the entire estate of the testator should be exhausted to pay his debts before these manumitted negroes could be divested of their right to freedom. *Act of 1796, ch.*

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67, sec. 13. 7 G. & J., 96, *Allein vs. Sharp.* 4 Md. Rep., 351, *Magruder & Tuck, vs. Carroll.* 1 Md. Ch. Dec., 296, *Thomas vs. Wood.*

4th. Because the bequest of freedom to the appellants was a specific bequest, and they, as such legatees, are entitled as against the heirs at law, the personal representatives of the testator, and the pecuniary and residuary legatees, to have the *whole estate* exhausted before their specific legacy can be interfered with. 2 H. & G., 7, *Negro George vs. Corse*, (Opinion of Archer J.) 6 Gill, 328, *Cornish vs. Wilson.* 11 G. & J., 185, *Chase vs. Lockerman.* 8 Gill, 321, *Spencer vs. Negro Dennis.* 1 Story's Eq., sec. 577. 2 Wms. Excrs., 942. 4 Ves., 748, *Kirby vs. Potter*, note (a.) 2 Ves. Jr., 639, *Coleman vs. Coleman*, note (a.)

5th. Because, assuming that the pecuniary legacies under this will are also to be considered as specific, there is no principle of law or equity which would make the residue of the testator's debts payable exclusively by these appellants, but that in any event they would be required only to contribute to their payment, ratably with all other specific legatees. 2 Jarman on Wills, 393. 6 Gill, 301. 11 G. & J., 185. 1 Merivale, 229.

*Samuel H. Berry* and *C. C. Magruder* for the appellee, argued that the court properly refused the injunction:

1st. Because the statement of facts contained in the bill, was not verified by an affidavit, as the law requires, nor was a bond proffered by the complainants. Alexander's Ch. Pr., 80, 81. 1 Bland, 177, *Jones vs. Magill.* 2 Bland, 99, *Binney's Case.* 3 Bland, 125, 162, *Salmon vs. Clagett.* 1 Bland, 566, *Billingslea vs. Gilbert.* 8 G. & J., 324, *Union Bank vs. Poultney, et al.*

2nd. Because the personal property is the natural fund for the payment of the debts of a deceased party, and the specific legatees of the realty or the proceeds thereof, in this case, are not bound to contribute to the payment of the testator's debts, as within the provisions of his will they will be regarded as specific legatees. 1 Roper on Legacies, 149, 154. 18 Ves., 463, *Page vs. Leapingwell.* 2 H. & G., 1, *Negro George*

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*vs. Corse.* 11 *G. & J.*, 185, *Chase vs. Lockerman.* 4 *Md. Rep.*, 335, *Magruder & Tuck vs. Carroll.* 11 *Md. Rep.*, 41, *Dugan vs. Hollins.* *Acts of 1752, ch. 3,* and 1796, *cl. 67.* 2 *G. & J.*, 32, *Simmons vs. Drury.* 10 *G. & J.*, 143, *Stevens vs. Gregg.*

3rd. Because under the averments in the complainants' bill, they are not entitled to relief, against the specific legatees of the realty. 6 *H. & J.*, 29, *Chalmers vs. Chambers.* 10 *G. & J.*, 65, *Gibson vs. McCormick.* 6 *Gill*, 105, *Hilleary vs. Hurdle.* 1 *Gill*, 234, *Berry vs. Pierson.*

LE GRAND, C. J., delivered the opinion of this court.

The bill in this case was filed by the appellants, who were the slaves of the testator of the appellee, and who claim to have been manumitted by his last will and testament. It alleges, that the appellee had taken out letters of administration, and had proceeded to some extent in the discharge of his duty as such, but had not returned to the orphans court a full account of his doings as he was required to do by law; that the estate is indebted, some of the claims against which had been prosecuted to judgments which were about to be executed by a levy on the appellants; that some of the judgments were obtained on obligations, in which the testator of the appellee was but security for a person who is a legatee under the will. It avers that there is property above and beyond what is necessary to pay all the debts of the estate without a resort to them, and that by a proper construction of the will of their master and a proper marshalling of assets, the debts of the estate would be paid and they entitled to their freedom; that they had filed a petition for freedom, but that they were unable to prosecute it successfully because of the difficulty in showing the true condition of the assets of the estate. They pray the court to take cognizance of the matters involved, and to so order a marshalling of the assets, and adjudge the respective rights of the several parties interested, as will enable them to clearly establish, on the trial of their petition for freedom, the true condition of the estate and their relation to it, and that until this be done, the petition case be stayed by an injunction, and also the ex-

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ecutor from paying the pecuniary legacies in the will, and the judgment creditors from executing their judgments as against them.

The court refused the injunction. It was argued that the court properly did so, if for no other reason, because the bill was not verified by affidavit. In general it is necessary that the bill should be sworn to, but this is not in all cases indispensable. Here, the complainants are negroes, and, under our act of Assembly of 1846, incompetent to give testimony in any case in which a white person is interested. They, therefore, could not have made the affidavit. What is required as preliminary to the granting of an injunction, other than the sufficiency of the averments of the bill, is, that the confidence of the court should be obtained, and this may be had on documentary evidence as well as on affidavit. *Salmon vs. Clagett*, 3 *Bland*, 162. *Jones vs. Magill*, 1 *Bland*, 180. *Alexander's Ch. Prac.*, 80, 81. The evidence accompanying the bill, is an authenticated copy of the will of the testator of the appellees, by which it appears the appellants are set free. There could be no fuller evidence offered of the ground on which rests their claim to freedom. If they be entitled to it at all, it is because of the bequest of it in the will. It is their muniment of title. There is nothing in the objection that no bond was tendered. No bond could be tendered until the court fixed the amount of the penalty. Had the court granted the injunction it would doubtless have done so, on the condition that a prescribed bond should be first filed.

The case of *Cornish vs. Wilson*, 6 *Gill*, 299, is a sufficient precedent for a proceeding like the present. The manumitted slaves under the decision in that case, have a right to the aid of a court of equity, in the marshalling of the assets of the testator under whose will they claim their freedom; and thus to procure the proper evidence to enable them to prosecute their petition for freedom. They are also, as determined by the same authority, entitled to the decision of such a tribunal, as to whether the real estate of the testator is charged with the payment of debts in favor of the bequest of freedom, and the proportion in which specific and general legacies are to con-

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tribute to the same end. These are among the objects of the bill in this case. The investigation, from the averments in the bill can, at the most, occasion but a short delay to any party in interest, while it will guarantee the preservation of the rights of a helpless class, if any rights they have.

*Order reversed and cause remanded.*

(Decided July 20th, 1858.)

ECCLESTON, J., dissented.

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**DIONYSIUS SHERIFF Exc'r of H. H. WARING, vs.  
NEGROES CHARLES, and others.**

The orphans court has no right, on the application of the executor, to pass an order for the sale of negroes manumitted by the will to pay debts, pending a bill filed in equity by such negroes, asking for the marshalling of assets, and the adjustment of the proportions in which the several legatees were bound to contribute to the payment of the debts, in order to enable the complainants to prosecute their petition for freedom.

**APPEAL from the Orphans Court for Prince Georges county.**

After the appellees in this case had filed their bill in the circuit court for an injunction, as stated in the preceding case, the executor, the present appellant, filed his petition in the orphans court, asking for the passage of an order directing a sale of the appellees for terms of years or for life, for the payment of the debts of his testator.

With this petition the executor exhibits the will of the testator showing the appellees to be thereby manumitted, as stated in the preceding case, and then alleges, that the whole of the personal estate other than the appellees, amounts to \$1939.83; that he has sold the real estate as directed by the will for \$4000, which, when received, he will be compelled to pay over to the specific legatees thereof under the will; that he has recently passed in this court an administration account, in which he has been allowed for payments and disbursements \$3284.84,

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showing an overpayment of the estate, not including the appraised value of the appellees, of \$1345.01; that he has realised from the hires of the appellees \$1242.50, which he has applied in paying the debts of the estate; that there is yet due debts besides judgments amounting to \$1413.14, and judgments recovered against him as executor, amounting to \$2348.65, and that the entire indebtedness of the estate now amounts to \$3864.30, and that the only property in the hands of the petitioner liable to pay this indebtedness is the appellees, and that the testator left no property to pay the same except the said negroes, all of whom have been levied on by the sheriff under *f. fas.*, issued by judgment creditors. Inasmuch, therefore, as the personal estate is the primary fund set apart by law for the payment of the debts of a deceased party, the petitioner prays the court to pass an order authorising him to sell said negroes for life, or for such terms of years as will realize a sum sufficient to pay all the debts of the estate.

With this petition there were filed as exhibits, the administration account and lists of debts and judgments therein referred to. The court refused to pass the order as prayed and dismissed the petition. From this decision the executor appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*Samuel H. Berry and C. C. Magruder* for the appellant.

1st. The orphans court clearly erred in refusing to pass an order to sell for life or for a term of years, the negroes of the testator to pay his debts as prayed by the executor, the petition and exhibits filed therewith, showing the propriety and necessity of the order. *Act of 1798, ch. 101, sub-ch. 8, secs. 3, 4. 6 Md. Rep., 347, Love vs. Love.* The personal estate is the primary fund for the payment of debts. *2 G. & J., 32, Simmons vs. Drury. 10 G. & J., 143, Stevens vs Grigg. 4 Md. Rep., 335, Magruder & Tuck vs. Carroll.*

2nd. The jurisdiction of the orphans court is not general but a limited jurisdiction, and they could not, and in consideration of the executor's application in this case, that court should

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not have refused the order to sell, because they were of opinion from the provisions of the will, that the proceeds of sale should have been applied to the payment of the testator's debts. See authorities cited under 2nd and 3rd points for the appellees in the preceding case, and also 6 *Gill*, 299, *Cornish vs. Wilson*, and 8 *Gill*, 58, *Stewart vs. Pattison*.

*Daniel C. Digges and Thos. G. Pratt* for the appellees, relied upon the 2nd, 3rd, 4th and 5th points, urged by them in the preceding case, and also insisted that there were numerous errors in the administration account of the executor, and that the account properly stated would show an outstanding indebtedness of only \$691.43.

LE GRAND, C. J., delivered the opinion of this court.

We are of opinion the court properly refused the prayer of the petition of the appellant. It is clear from the language of the will of his testator, that he intended to set free all his slaves, which he did, so far as he could do so, by unequivocal language. The substance of the averments of the petition may be thus given: that the personal estate of the deceased, other than the negroes, was inadequate to the payment of its debts; that some of the creditors had prosecuted their claims to judgment, and that all the other property of the testator had been specifically bequeathed, and that the negroes were the primary fund out of which the debts were to be paid. There had been no marshalling of the assets of the estate, so as to show what was the deficiency of personality, nor any adjustment of the proportions in which the several legatees, if bound to do so at all, were to contribute to the payment of the debts of the estate. Until these facts were established, the orphans court properly refused the prayer of the executor. Had it been granted, the rights of the negroes would have been concluded, when, under the law of this State, they had the right to have them passed upon by a court of equity, prior to the determination of their petition for freedom.

*Order affirmed with costs.*

(Decided July 20th, 1858.)

**REBECCA A. F. PORTER, Exc'x of FRANCIS EARLOUGHER, vs. CHARLES TIMANUS, and others.**

An appeal from the orphans court must be taken within *thirty days* after the decree, order, decision or judgment appealed from was passed, as required by the act of 1818, ch. 204, otherwise the appeal will be dismissed.

Under the act of 1831, ch. 315, the orphans court is clothed with a *discretion* to pass an order requiring an executor to bring money in his hands into court, and, upon failure to comply, to revoke his letters, and when that court has exercised such discretion, its decision is *final*, and no appeal lies therefrom.

Notice of such order ought, in all cases, to be given to the party upon whom it is designed to operate, and he should be allowed his day in court to comply therewith.

**APPEAL from the Orphans Court for Howard county.**

This appeal was taken on the 6th of March 1855, from several orders of the court below, passed in the matter of the estate of Francis Earlougher, deceased, of which the appellant was executrix.

By the will of the deceased, admitted to probate in 1849, he devised all his real estate to his executors and their heirs, in trust to sell the same, and, out of the proceeds, to pay his debts, and distribute the balance, after allowing his widow her thirds, among his children, in a specified manner. On the 7th of August 1849, letters testamentary were granted to appellant, who was the widow of the deceased, and one of the executors named in the will, and who proceeded to execute the trust by selling the personal and *real estate*, and passed several accounts in the orphans court. The real estate, consisting of a *farm* and a *house and lot*, were sold in March 1851, and April 1852, and these sales were reported to, and ratified by, the orphans court. The last account, which was passed on the 18th of July 1854, shows a balance due the estate of \$3007.28.

On the 17th of October 1854, the appellees, who were legatees under the will, filed their petition in the orphans court, objecting to an alleged proposed distribution account, about to be made by the executrix, on the ground that she had not

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charged herself with certain specified debts due the estate, nor with any *interest* on the amount of sales, nor with the *rents* of the house and farm, from the death of the testator to the times of sale, and praying that the account may be rejected, and that the executrix may be required to pass an account charging herself with these matters, and then the balance distributed among the parties according to their respective interests. This petition the executrix, having been duly cited, answered, insisting that she ought not to be charged with any of the matters referred to therein, for reasons which are stated at length in her answer.

Afterwards, on the 2nd of January 1855, as the record states, the *parties, by their attorneys*, again *appeared in court*, and oral testimony was taken as to the annual value of the house and farm, and, on that day, *two orders* were passed by the orphans court: The *first*, which purports to have been passed "in the matter of the petition of" the appellees, *adjudges* that the executrix "is answerable for all interest received, and for the interest due on notes or bonds, from the date of their maturity," and for the rent of the house and farm for two years, at the rate of \$100 per year for the former, and \$200 per year for the latter, and *orders* her to "pay or bring into this court the sum of \$600, for rents received by her for the farm and house, before the sales thereof, and all the interest received by her, or properly chargeable on the amount of the said sales of the said house and farm." The *second order*, which purports to have been passed "on the application of" the appellees, directs the executrix to "bring into this court, on or before the 16th day of January 1855, the sum of \$3007.28, being the balance appearing to be due on the last account passed therein by her." On the same day (2nd of January 1855,) the court ordered a summons to be issued to the executrix to appear in court on the 16th of January 1855, "to show cause, if any she have, why the assets in hand should not be distributed," and the summons, which is set out in the record, and was duly served, is to the same effect, with the additional words "as directed in the order of said court passed this day."

On the 20th of February 1855, the court, at the instance of

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the appellees, passed another order directing the executrix to "bring into this court, under an order of the said court of the 2nd day of January 1855, on or before the 6th day of March 1855, the sum of \$3007.28, being the balance appearing to be due on the last account passed therein by her, otherwise this court will revoke the letters of the said executrix, and appoint an administrator from among the legal heirs." On the 6th of March 1855, the executrix having failed to comply with these orders, the court passed an order revoking her letters, and appointing an administrator in her place, and on the same day she, by her attorney, prayed "an appeal from the orders and decrees of the said orphans court, as aforesaid rendered in the premises."

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

Wm. Schley for the appellants:

1st. The order of the 2nd of January 1855, was erroneous, 1st, because it declares that the executrix is answerable for the interest due on notes or bonds from their maturity. 2nd, because it charges her, as executrix, for the use and occupation of the farm and house. 3rd, because it requires her, as executrix, to bring into court \$600 for rents, and \$3007.28 for distribution.

2nd. The order of the 20th of February 1855, is erroneous, 1st, because it is founded on the erroneous order of the 2nd of January 1855. 2nd, because it orders the fund to be brought into court for distribution. 3rd, because it determines ab ante that failure to comply shall *ipso facto* be a ground for revocation of her letters.

3rd. The order of the 6th of March 1855, was erroneous, 1st, because no notice was given to the appellant of the exigency of the order of the 20th of February, and she was not present or represented either when that order or the order of the 5th of March was passed. 2nd, because the failure to bring the fund into court for distribution, was not a ground on which her letters ought to have been revoked.

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By the will of the testator, his real estate was directed to be sold, and *when sold*, the proceeds were properly personal estate, the conversion to that extent being effected by the will. But *until the power of sale is exercised*, the real estate technically descends to the heirs, and subsists as real estate until converted by actual sale, or, by the exercise of the power the estate which so descended to the heirs is divested; but the intermediate profits are the issues and profits of *real estate*, and belong to the heirs, *qua heirs*, and not to the legatees under the will. Whether a court of chancery would, in case of unjustifiable delay, appoint a receiver, is not involved in this inquiry, but clearly the orphans court has no general jurisdiction over trusts. 4 Md. Ch. Dec., 425, *Conner vs. Ogle*. It would seem, therefore, an error to require her to account, as executrix, for the farm and house which she occupied up to the time of sale.

Again, by the order, she is not only required to account for interest *received* by her, but is made answerable for interest *due* on notes and bonds from the date of their maturity. By the *terms* of this decree she is made answerable for *more* than she has received—for what is still *due*, and which may *never* be received. This is clearly erroneous.

Again, by what authority does the orphans court call in *money* for distribution in a case where the executrix did not ask the assistance of that court? There are many provisions which relate to cases of proposed *investments* of money; and provisions which relate to cases of apprehended *loss*; and provisions which relate to distribution of a surplus or specific articles. The act of 1810, ch. 34, sec. 5, relates to property in kind, and the case of *Williams vs. Holmes*, 9 Md. Rep., 281, was a case of distribution *in kind*. By the act of 1798, ch. 101, the application of the administrator to the orphans court, was the condition on which the court could make the distribution, (sub. ch. 11, sec. 16,) and by sub. ch. 14, sec. 12, an executor may appoint a meeting of parties interested for distribution, and on a day approved by the court, “*pay-  
ment or distribution may be made under the direction and  
control of the court.*” But is the administrator *bound* so to apply?

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more especially is an *executor* bound so to apply? The testamentary bond is liable for any default, and a court of chancery may take jurisdiction under certain circumstances. But a legatee cannot collect his legacy, whether specific or residuary, through the orphans court. That court cannot exercise the functions of a court of law.

Now the right to the office of *executrix* is a vested right, and is protected by law, and no one clothed with that office can be deprived of it, unless upon justifiable cause. And unless the court had jurisdiction to make distribution of the residue, *as a matter of judicial right* on the promotion of the legatees, *her failure* to comply with the order of that court was no justification for the revocation of her letters. Besides this, she ought to have had notice, by citation or service, of the exigency of the order of the 20th of February 1855, and as none was given her, she was not even guilty of *contempt*, much less of default.

*Oliver Miller* for the appellees:

1st. There were *two separate* orders passed on the 2nd of January 1855, and if there was any error in either of them, an appeal should have been taken therefrom within the *thirty days* required by law for appeals from all orders and decrees of the orphans courts. The appeal is given by the act of 1818, ch. 204, sec. 1, upon the express *condition* that it shall be taken within thirty days; the words are, "*Provided* such appeal be made within thirty days after such decree, order, decision or judgment." The appeal on the 6th of March 1855, was *too late*, and cannot open for review either of these orders.

2nd. But suppose they are open, there certainly is no error which this court can review, and none in law in the *second order*, requiring the balance on the last administration account to be *brought into court*. It simply directs the executrix to bring the money *into court*; it does not say it is to be brought in for the *purpose of distribution*. That the orphans court had the power to pass this order, is clearly shown by the act of 1831, ch. 315, secs. 4, 5. These sections expressly declare that the orphans courts are "authorized and empowered, in

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their *discretion*, and whenever to them it shall seem proper, either *ex officio* or upon *application*, to order any executor to bring into court, or place in bank, or invest any money or funds received by such executor," and further, that such money or funds "shall at *all times* be subject to the order and control of such court." The case of *Ex parte Shipley & Wife*, 4 Md. Rep., 493, decides that when the court has exercised the *discretion* committed to them by this act, their decision is final, and no appeal will lie. See, also, 6 Md. Rep., 552, *Falconer vs. Regelier*. But if the exercise of this discretion is, in this case, subject to review, what is there to show there was not a sound judicial exercise of the authority? The real and personal estate had been sold and converted into money *years* before the order was passed. This money was, by the account of the executrix, admitted to be in her hands, and she is ordered to bring it into court. It was an order which it was the *duty* of the court to pass, and too great forbearance was shown the executrix in not revoking her letters *immediately* upon her failure to comply with it. It was passed on the 2nd of January, on a day when she, by *her counsel*, *was in court*, and, of course, had *actual notice* thereof. It gave her till the 16th of January to bring in the money, which is certainly a "*reasonable time*" within the meaning of the act of 1831, already referred to. For her failure to comply with this order, the court would have been justified in revoking her letters at once.

3rd. The order of the 20th of February is the *first* in reference to which the appeal is *in time*. Several objections are made to this order. 1st, it is said to be founded on the erroneous order of the 2nd of January. But it is founded on the *second order* of that date, which the court had the clear right to pass under the act of 1831; it does not profess to be founded on the *first order* of that date, which has reference to the *rent and interest*. 2nd, it is objected that it orders the money to be brought in *for distribution*. This is a mistake, for the order says nothing in regard to the *purpose* for which the money was to be brought in. 3rd, another objection is, that it determines *ab ante* that a failure to comply shall *ipso facto* be a

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ground for revocation of letters. But in this respect the order is a *simple warning* that the court will do that which the act of 1831, ch. 315, secs. 4, 5, says it *may do*. This act does make a failure to comply with such an order *ipso facto* a ground for revocation of letters. It says, that if an executor "shall not, within a reasonable time to be fixed by the court, comply with the order of the court to bring the money into court, the letters testamentary granted to such executor may be revoked by the court." It is true the court need not have inserted this warning in their order, for the executrix was bound to know that the law imposed this penalty for her neglect, but it can surely be no valid objection to an order that it says the court will do that which the law says they may do, and especially not in this case, where the executrix had failed to comply with a previous order to the same effect. This, then, was an order which, like the previous one, the court had the clear right to pass in its discretion, and *ex officio* without motion or application, one which it was proper for the court to pass, in order to secure the safety of the fund; and, in short, one which the court passed in the exercise of a *sound discretion*, and, therefore, not the subject of review by this court.

4th. The order of the 6th of March properly revoked the letters. It was a clear case of an executrix failing to obey *two separate orders*, which the court had a clear right to pass, and the penalty for which is equally as clearly defined by the act of Assembly. It is objected that she had no notice of the order of the 20th of February, and was not present or represented when it was passed. But she was present and represented by *counsel in court*, when the order of the 2nd of January, directing her to bring this very money into court, and the failure to comply with *that order* for so long a time, was a sufficient reason for the passage of the order of the 6th of March, without the intervening order of the 20th of February. It is submitted, further, that there is nothing in the act of 1831, requiring notice of such an order to be given, and every executrix is bound to take notice of all orders passed by the court, in reference to the administration of the estate, just as parties to a case

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in chancery are bound to take notice of all orders passed in the progress of the cause.

If the above positions are correct, the appeal must be *dismissed*. But even if the *first order* of the 2nd of January is open for review here, then it is submitted there was no error in it. The act of 1831, ch. 315, converts real estate directed by will to be sold, into assets, requires the sale to be made under the direction of the orphans court, in the same manner as sales are made under decrees in chancery, and makes the bond of the executor responsible "to the same extent and in the same manner" for the proceeds of such real estate "as if it were personal estate in his" hands. In construing this law, this court, in *Dent vs. Maddox*, 4 Md. Rep., 530, say: "The proceeds of such sales are to be accounted for, in the orphans court, in the same manner as the sales of personal estate." The orphans court being, then, the proper accounting *forum*, for what is the executrix responsible? For the interest on the bonds taken for the purchase money, she must, of course, account, so far as she has *received* it. She took securities, bearing interest, for the credit payments on these sales, and she received the cash payments, and for several years retained the money in her hands, applying no part of it to the payment of the debts of the estate. The case, so far as interest on the cash payments is concerned, clearly comes within the principle decided in *Mickle vs. Cross*, 10 Md. Rep., 352. As to the interest due, which she ought to have received, if she did not, this court, in the case of *Dent vs. Maddox*, has said: "It is the duty of a trustee to collect the proceeds of sale, or show why he does not, and if he fails to do this, he must be dealt with as if they had come to his hands." The executrix here is to account in the same manner as a trustee would in chancery, and not having shown that she did not receive the money when due, nor why she did not, she must be charged with interest as if she had received it. On this point see, also, 4 G. & J., 453, *Gwynn vs. Dorsey*; 3 G. & J., 20, *Wilson vs. Wilson*. She is also responsible for the *rent* of the house and farm whilst she occupied and neglected to sell them. The will, in this case, does not simply contain a direction to sell,

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but is a devise to the executrix and her heirs, in trust, to sell, so that the legal estate does not descend to the heirs, but vests in the executrix, and the intermediate rents and profits belonged to her, and must be accounted for. Moreover, the act of 1831, and the authorities already referred to, work a conversion from realty to personality, or, in other words, convert the real estate directed to be sold into assets, from the moment the will is admitted to probate, and letters granted to the executor. It then becomes personal estate, and for the rent the executor is just as much responsible as for the hires of negroes belonging to the estate.

Nor is it admitted that the orphans court had no power to order the money to be brought in upon application of the distributees, for the purpose of distribution. By the act of 1798, ch. 101, sub-ch. 15, sec. 1, the power is expressly conferred upon the orphans court of "superintending the distribution of the estates of intestates, and securing the rights of orphans and legatees." Sub-ch. 11, makes it the *duty* of the administrator to distribute, and sec. 16 of that sub-ch., provides, that in case the distributees object to the distribution, (as was done here,) the court may direct a sale, for the purpose of distribution. Here, all the property had been sold by previous orders, and the balance in hand consisted of money. See, also, sub-ch. 14, sec. 12, and 3 *Bland*, 184, *Hewitt's Case*, and 9 *Md. Rep.*, 281, *Williams vs. Holmes*. It is not necessary that the executor should signify his assent or readiness to make distribution, or apply to the court for that purpose, before it can act. The application may be made as well by distributees and legatees, and there are many cases in our courts in which they have made applications to compel the executor to make distribution; the case of *Cassilly & Wife, vs. Meyer*, 4 *Md. Rep.*, 1, is such a case. Besides, it must be remembered that this money is the proceeds of real estate sold by the executrix under the act of 1831, and in reference to it, for all purposes, the orphans court have, by that act, and the decisions of this court above referred to, the same authority as a court of chancery would have, in case the property had been sold under a decree in chancery.

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BARTOL, J., delivered the opinion of this court.

This is an appeal taken on the 6th day of March 1855, from several orders and decrees of the orphans court for Howard county.

The record shows that there were two orders passed on the 2nd of January 1855. These are not open for review under this appeal, and as to them the appeal must be dismissed, on the ground that it was not taken in thirty days, as required by the act of 1818, ch. 204, sec. 1. The words of the act are: "Provided such appeal be made *within thirty days after such decree, order, decision or judgment.*"

One of the orders passed on the 2nd day of January 1855, required the appellant to bring into court on or before the 16th day of January 1855, the sum of \$3007.28, being the balance appearing to be due on the last account passed therein by her.

On the 20th day of February 1855, another order was passed requiring the executrix "to bring into this court, under an order of said court of the 2nd day of January 1855, on or before the 6th day of March 1855, the sum of \$3007.28, being the balance appearing to be due on the last account passed therein by her, otherwise this court will revoke the letters of said executrix, and appoint an administrator from among the legal heirs."

And on the 6th of March, the day limited in the previous order for the money to be brought into court, the executrix having failed to comply, the said court passed an order revoking her letters, and appointing an administrator in her place.

The appeal was taken within thirty days after these last two orders, and would bring them before us for review, if they were of such a nature as to be proper ground for appeal. But this court has decided, in *Ex parte Shipley & Wife*, 4 Md. Rep., 496, that, under the act of 1831, ch. 315, sec. 4, the orphans court is clothed with a discretion to pass such orders, and when it has passed upon such an application, its decision is final, and no appeal will lie. It is true that the power vested in the orphans court by the act of 1831, is to be exercised with a sound, legal discretion, and not capriciously or arbitrarily. And in the case before us, even if it were proper to entertain

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the inquiry, we can discover no evidence of such arbitrary exercise of the discretionary power, as alleged by the appellant's counsel. It is objected that the order of the 20th of February was erroneous, because it was founded on the order of the 2nd of January, which, it is alleged, ordered the fund to be brought into court *for distribution*. Without expressing any opinion upon the question of the powers of the orphans courts to order funds to be brought in for distribution, it is sufficient, for this case, to say that there were two orders passed on the 2nd of January. The particular order of that date, on which that of the 20th of February was founded, and to which the latter refers, did not order the fund to be brought into court *for distribution*, but simply ordered the executor to bring it into court. Nor did the order of the 20th of February determine *ab ante* that a failure to comply should *ipso facto* be a ground for a revocation of the letters. The act of Assembly declares that the orphans court may revoke the letters on a failure to comply with such order within a reasonable time; and although it was not necessary to admonish the executrix, in the order, of the possible consequence of her contumacy, such a warning did not render the order erroneous.

To the order of the 6th of March, it is objected that no notice was given to the appellant of the exigency of the order of the 20th of February. But the record shows that she was in court, represented by counsel, when the order of the 2nd of January was passed, which required her to bring the money into court, and the failure to comply with such order, was a sufficient reason for a revocation of the letters, without the intervening order of the 20th of February. Notwithstanding the suggestion by the appellees' counsel, that no notice of such an order is required by the terms of the act of 1831, and that none is necessary, we are of the opinion notice ought, in all cases, to be given to the party upon whom the order is designed to operate, and that he should be allowed his day in court to comply with its exigencies, or to show cause to the contrary before the revocation, of the letters. But, in this case, we consider ample and complete notice was given, and that the orphans court acted with sound and judicious discretion in the premises.

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Although none of the orders appealed from are properly before us for review, we have deemed it proper to notice the objections urged by the appellant.

In deciding that no appeal lies from the order of the 6th of March, revoking the letters, we must be understood as confining our judgment to such an order passed under the act of 1831. This is a proceeding under that act which we have said vests a discretion in the orphans court.

*Appeal dismissed.*

(Decided July 20th, 1858.)

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LAVINIA E. SCHINDEL by *prochein ami*, *vs.*  
ANDREW J. SCHINDEL.

The acts of 1841, ch. 161, 1842, ch. 293, and 1853, ch. 245, relating to the rights of married women, simply protect the property of the wife from the debts of the husband during her life, but in no other way interfere with his marital rights and control over it.

The provision of the constitution, that the Legislature "shall pass laws necessary to protect the property of the wife from the debts of the husband during her life, *and* for securing the same to her issue after her death," does not operate to change the rights of property acquired by marriage, so as to deprive the husband of all his marital rights secured to him by the common law.

The act of 1853, ch. 245, passed in pursuance of this constitutional requirement, simply carried out one branch of the duty imposed on the Legislature, viz., that of protecting the property of the wife from the debts of the husband.

A wife living separate from her husband, without his consent and without *justifiable* cause, cannot be allowed *maintenance* out of her *legal* estate which she inherited and was seized and possessed of at the time of the marriage; in such a case a court of equity has no power or jurisdiction to disturb the husband in the exercise of his legal rights over her property, or decree any equitable settlement for the wife out of it.

The causes which will justify a wife in separating from her husband, must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be performed.

**APPEAL from the equity side of the Circuit Court for Washington county.**

The bill in this case was filed on the 31st of January 1856, by the appellant against her husband the appellee. It alleges, that the complainant was married to the defendant on the 8th of May 1855, and at the time of such intermarriage she was seized and possessed of a large real and personal estate, inherited from her father, who died in September 1853, and that the real estate, worth upwards of \$21,000, had been, previous to the marriage, allotted to her under the act to direct descents, and the personalty amounting to \$5000, she had received in course of distribution from her father's estate, and that all of this property real and personal, had passed into the hands and under the control of the defendant as her husband. The bill further charges, that they lived happily together as man and wife, from the time of their marriage until the 2nd day of the following month, when, in the city of Philadelphia, on their return from a bridal tour, the defendant first exhibited the bad and harsh temper and perverse disposition, that has ever since characterised his intercourse with complainant; and then and there without the least cause on her part to justify ill-treatment of any kind, he used the most mortifying and offensive language to her, threatened her with an application for a divorce, and in every respect, on that occasion, behaving in a most unbecoming and unhusbandlike manner; that afterwards, at home, from time to time he abused her with ill, insulting and severe language, exulted over her as having the possession and entire control of her estate, and asserting her exclusive dependence upon him, and at the same time interdicting her in the purchase of things necessary to her comfort and suitable to her condition in life, and that unable any longer to bear with his harsh and cruel treatment, and to relieve herself from her unhappy condition in his society, a separation was necessary, and took place on the 2nd of November 1855.

The bill further charges, that the defendant having absorbed the whole of her personal estate, and being in possession of, and managing, controlling and leasing her real estate, and receiving to himself the whole produce and profits thereof, com-

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plainant is thereby deprived of all support whatever, and being so divested of her entire estate, and left utterly without resources by the conduct of the defendant, she was obliged to obtain wearing apparel and other necessaries for her comfort, and suitable to her condition in life upon credit, whereupon the defendant, in the same harsh and cruel spirit before manifested towards her, has personally notified the merchants and shop-keepers in the town where she and defendant reside, not to credit her, by reason whereof she was not only likely to be embarrassed in procuring such necessities, but to be brought into public contempt and disgrace; that she is advised, that the defendant being now in possession of said personal estate, and in the sole and entire possession and control of the said real estate, and receiving the rents, produce and profits thereof, for his own use and benefit, contrary to her rights and equities, she is entitled to have an account of the same rendered by the defendant, and also is entitled to enjoy her said real estate, in her own name and as her own property, and to her sole and separate use without the interference of the defendant.

The bill then prays, that the defendant be required to account for whatever of the rents, produce and profits, of the said real estate, and other the personal estate of the complainant, which have come into his hands since the said marriage, and that he may be by injunction restrained from collecting or reducing into possession any of the rents, profits and produce of said real estate, due or to become due under any lease or otherwise, or to receive the rents, produce or profits of the same under any lease or otherwise, and that he may be enjoined from managing, controlling, renting or leasing, or in any way intermeddling with said real estate, and that the complainant may have the full enjoyment of her said real and personal estate, to her own sole and separate use, and for general relief.

The answer of the husband admits the marriage, and his possession and control of his wife's real estate, and receipt of the rents and profits of the same as alleged in the bill, and the possession of her personal estate to the amount of about \$3400, a large portion of which he avers he has expended in improvements and repairs, upon the land so acquired by his marriage.

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He admits and avers, that his said wife some time after their marriage left his house and her own proper home, and went to the house of her mother, where she has ever since continued to reside with her said mother and respondent's brother and wife. He altogether and utterly denies, that he ever ill-treated or abused his said wife, or ever gave her any just or colorable cause for leaving his house, care and protection, and avers that she voluntarily left the same where she was well and comfortably provided for, without his consent and altogether against his wishes and remonstrances. He avers that the course of his said wife has been instigated by the evil counsels and baneful influence of others, and that he has used every effort to reconcile and induce her to return home and live with him as man and wife should live, but that all his efforts were unavailing. He further avers, that he has ever been most indulgent to his wife, gratifying or attempting to gratify her in every want and wish however unreasonable, and while he admits there have been some few occasions, upon which he has been provoked, to speak to her in such unguarded terms, as, though with no intention of wounding, might appear to a sensitive person to be so intended, yet whenever such a thing has transpired, he has always made it his first duty to apply himself most assiduously to making amends and atonement, with which she always appeared to be satisfied at the time, and he is convinced that the charges in the bill, in regard to ill treatment and the manifestations of strong temper are the bare subterfuges of third parties, under whose injurious influence his wife has been and now is, as a pretext for their unjustifiable conduct in the premises. He denies that since the separation she has not been provided for, or, with the means of providing for her comforts; and though he admits that, in consequence of being informed of her making most extravagant bills on his credit, he did interdict all dealing with her on his credit, yet he avers, it never has been his intention for a moment, to deprive her of the means of providing herself with all the necessaries and comforts of life, but he has intended to supply her with ample means to make provision

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for her comfort, notwithstanding her undutiful and derelict treatment and behavior.

The defendant filed exceptions to the bill, for want of jurisdiction in the court to grant the relief or any part of it as prayed upon the case stated in the bill, and also to the allegations of the bill, as being insufficient to entitle the complainant to any relief whatever. A commission was then issued and a large mass of testimony taken on both sides, which need not be stated, as its purport is sufficiently indicated in the opinion of this court, as well as in the following opinion of the court below, (*Perry, J.*.) delivered upon passage of the order dismissing the bill:

"The value of the property in controversy, and the importance of the principles to be determined in this case, have given to it an unusual interest, and I do not hesitate to say, that the difficulty in arriving at the meaning of the Legislature, in the acts of 1842, ch. 293, and 1853, ch. 245, and the doctrine of the recent cases of *Logan vs. McGill & Wife*, 8 *Md. Rep.*, 461, and *Unger & Wife, vs. Price*, 9 *Md. Rep.*, 552, has been to me the occasion of much perplexity. It is contended on the part of the complainant, that the acts of 1842 and 1853, vest the property of the complainant in her as a *feme sole*, in disregard to all the marital rights of the husband. In other words, that she is to possess it as if the conjugal relation did not exist as well against him as creditors. The act of 1853 it is urged, does more than protect the property of the wife from the debts of the husband; that it deprives him of all use of, or interest in, or title to her property. For this construction, I have been referred to the case of *Unger & Wife, vs. Price*, recently decided in the Court of Appeals. The court in that case do not determine that she is to hold as a *feme sole*, in all cases in which she may acquire property from a source independent of her husband, but property held or acquired in any of the modes provided for by the act of 1853, would be held by her as a *feme sole*, as against the creditors of the husband.

"In the case of *Logan vs. McGill & Wife*, the Chief Justice says: 'The act of 1842 was designed to authorize the wife to acquire property real and *slaves*, in the particular mode

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there pointed out without the intervention of a trustee.' These two cases were decided in contests between the creditors of the husband and the wife, not between husband and wife, and, therefore, are not applicable to this case. By the 3rd art. sec. 38, of the Constitution, it is made the duty of the Legislature, 'to pass laws necessary to protect the property of the wife from the debts of the husband during her life, and for securing the same to her issue after her death.' The Legislature did, in 1853, pass an act entitled 'An act, to protect the property of the wife from the debts of the husband, as required by the 38th section of the 3rd article of the constitution.' This act having been passed, in compliance with the requirements of the constitution, I think it proper to resort to the constitution, to arrive at the probable meaning of the Legislature, and for such interpretation as will accomplish the design of that instrument. Esteeming the cases to which reference has been made, as applying to controversies between creditors of the husband and the wife, and as not deciding the important question in this case, I feel myself unfettered by authority and at liberty to construe these acts as I believe the Legislature designed. The constitution having required the passage of a law, 'to protect the wife's property from the debts of the husband,' and the title of the act of 1853, professing to comply with its requirements in this particular, in my opinion, the law was not intended to deprive the husband of the use of the property. It was only intended to secure it against his creditors. The act by its title intending to accomplish such a design, is it proper to give a construction to the law, by which a change is to be made in the social relations of husband and wife, unknown to the common law, and which requires from her that which would do violence to that delicacy and retirement which is so much admired and encouraged, and so essential to the happiness of the marriage state? To give her a title as a *feme sole*, a title independent of, and distinct from her husband, would, as an incident to such right, require her to make all contracts and agreements and perform all the duties usually expected from the other sex, forcing her from the domestic circle to go out into the community to pro-

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tect the right to, and secure the profits of her property. The husband and wife in this case are both alive, and I am required to say whether the husband has been deprived of the control and usufruct of his wife's property during their joint lives. I think he has not. The only restriction of his common law rights, is the one provision which protects her property against his creditors during her life. His control and use of her property remains as far as it is not inconsistent with this protection. He has the right to manage, use and enjoy it, but his creditors cannot take it. Her disability to contract debts and make contracts still exists. She cannot enter into a personal engagement, so as to give a remedy against her for its violation. 2 *Story's Eq.*, sec. 1397. To give her a title in her property in every sense hostile to the husband, and not to have the capacity to contract or assume obligations on her part in respect to it, ought not to be determined but by plain and undoubted legislation. If she could not be sued for violation of agreements made in regard to her property, her contracts would want that mutuality which ought to exist for the protection of the public.

"In the construction of a statute, the preamble is resorted to for the purpose of ascertaining its true meaning. It is esteemed a key to its construction. 4 *G. & J.*, 1, *Canal Cb., vs. The Rail Road Co.* As before stated, by the provisions of the constitution, the Legislature was required to pass a law, to secure the property of the wife against the creditors of the husband during her life, and to her issue after her death. The title to the act of 1853, securing the wife's property against the debts of the husband and nothing more, very cogent reasons should exist to give such a statute a more extended meaning. The sections of the act might, if standing alone, render the question still more doubtful, but when I consider the purposes of the constitution, the title of the act, and the great change in the conjugal relations of husband and wife, if such was done, I cannot give the construction contended for. By art. 3rd, sec. 17, of the constitution, 'every law enacted by the Legislature shall embrace but one subject, and that shall be described in the title.' This law, by its title, is intended to se-

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cure the wife's property against the debts of the husband, and being confined to that alone, I do not doubt the propriety of esteeming the title a part of the statute, and to be resorted to and considered as a key to its construction as much as the preamble. The constitution having such a provision, and this having been required of the Legislature, it cannot be departed from. Indeed it has been decided, that a law would be rendered void if the principle subject of the law was not properly described in the title. *7 Md. Rep.*, 151, *Davis vs. The State*. There being in the title of the act of 1853, but one subject described, I have looked to that circumstance to aid in its construction.

"The proof does not show such conduct on the part of the husband, as to justify the interposition of a court of equity, as claimed in her behalf. To authorise such a proceeding, a wife must show extreme cruelty, such as damage to the person, or such circumstances as to induce a reasonable apprehension of bodily injury. Slight causes, as ebullition of passion, harsh language, peevishness, will not be enough. *2 Kent*, 129. *4 Johns. Ch. Rep.*, 189, *Barrere vs. Barrere*. *2 Md. Ch. Dec.*, 340. *Daiger vs. Daiger*. *Ibid.*, 351, *Coles vs. Coles*. *3 Md. Ch. Dec.*, 54, *Bowic vs. Bowic*.

"For these reasons, I am constrained to dismiss the bill of complaint, but, in doing so, I have determined not to award to the defendant full costs, as such is entirely in the discretion of the court. *5 G. & J.*, 314, *Claggett vs. Salmon*. *12 G. & J.*, 289, *Lee vs. Pindle*. The defendant has the money and property of his wife, and there is seen in the testimony much for which he can be blamed, enough to justify a decree denying costs to him."

From the order, passed in conformity with this opinion, the complainant appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BARTOL, J.

Wm. T. Hamilton and Thos. S. Alexander for the appellant:

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1st. The wife having acquired the whole of the property in controversy, since the passage of the acts of 1842, ch. 293, and 1853, ch. 245, possesses whatever rights and powers they or either of them secure to her over it. Legislation for the benefit of the wife as to her real property, commenced in this State in the year 1841. By the common law, the husband had a freehold interest during their joint lives, in her freehold property of inheritance, which he could himself hold, enjoy and alien, and which could be taken in execution for his debts, and by the curtesy could hold it after her death. The act of 1841, ch. 161, deprived the creditor of the husband of the power to take this interest in execution during the life of the wife, manifestly intending thereby to secure a benefit to the wife, the husband, however, still possessing the right to enjoy it himself and to alien it. To remedy this and to secure to the wife the certain benefit of her real property, without the power of the husband in any way to deprive her of it, the act of 1842, ch. 293, was passed, which secures to the wife the enjoyment of the specific property mentioned in it, to her sole and separate use. The title, the context and the object in view, are to be considered together to obtain the law governing the case. As a remedial statute, it is to be construed liberally to effectuate the object in view. (*Dwaris on Statutes*, 718 to 721. 1 *Kent*, 464, 465.) Statutes are to be construed, with a view to the original intent and meaning of the makers. (2 *G. & J.*, 374, *State vs. Boyd*. 4 *G. & J.*, 152 to 154, *Canal Co., vs. Rail Road Co.*) The title is: "An act to regulate conjugal rights," as they regard property, and such *rights* are alone involved in the title. Then what rights are regulated, affected, diminished or extended? The first section provides, that "any married woman may become seized or possessed of any property real or of slaves, in her own name and as of her own property." This section directs *how* a married woman is to stand seized or possessed of the specific property, whether acquired before or after coverture. *Seizin*, as a technical term, denotes complete investiture, and for a complete title to lands the seizin or possession and right of property are necessary. But how is she to be seized or possessed? "In her own name

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and as of her own property.' In this the Legislature intended to secure to the wife the right of *enjoyment* as to her property real, otherwise this language would mean nothing, but merely announce what the law was before; for whether covert or sole a woman could always stand seized of her real property in her own name and as her property, and indeed it is only through such seizin in fact or in law, that the marital rights of the husband would attach. "*In her own name,*" are words of definition fixing the *status* of the property, and how it should be held, severing the interest and holding of the husband as before existing by law, and vesting the sole interest in her by the sole investiture in her own name. "*As of her own property,*" are words of illustration showing how absolutely she is to hold it; importing that her seizin is to be as unlimited and absolute as if a *feme sole* or as if the marital right did not attach. The words of the statute are to be taken in their plain signification and import. Technical words when used are to be taken in that sense, unless it appears otherwise from the intent, and words may vary according to the subject, and ought to be expounded to gratify the object. (*Dwarris*, 618, 626. 1 *Kent*, 492. 2 *G. & J.*, 374. 4 *G. & J.*, 152, 153.) Taking these words in their plain and indeed technical signification, and keeping in view the object of the Legislature, and the liberal and beneficent spirit pervading the legislation of the day, in order to secure to the wife the enjoyment of her property, there is by this section a complete and sole investiture or possession of the real property, embraced in its provisions, in the wife, in her own name and as her own property, to be held and enjoyed by her as a *feme sole*. The whole object and scope of this act, are to secure benefits and rights to the wife, first as to her property real and slaves, secondly as to property acquired by her personal labor to a fixed amount, and thirdly she is invested with the right to make a will and give all her property to her husband, and with his consent to others. And this right to make a will can be considered compensatory to the husband for the deprivation of his marital rights by the other sections of the act; for the general influence of the husband over the wife, will almost always secure a just if not a liberal share of her property.

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Again, these words of the first section, in themselves, divested of that which generally enters into the construction of an act of Assembly, establish in the wife an estate to her sole and separate use. Under a will, deed or marriage settlement, such an estate is created either by express words or by just implication. No technical words are necessary to create such an estate, but adequate language should be employed. If, from the context of the instrument limiting to the wife the property, it was intended that it should be to her separate use, such intention will be carried into effect. (2 Story's *Eq.*, secs. 1381, 1384. 3 G. & J., 504, *Carroll vs. Lee*. 9 Md. Rep., 552, *Unger & Wife vs. Price*. 2 Roper on *Husband & Wife*, 152, 160. *Clancy on Husband & Wife*, 262 to 270.) Bequeathing the capital sum according to her appointment, whether covert or sole, is sufficient to create such an estate. (5 Ves., 517, *Lumb vs. Milnes* and notes.) "To pay into her proper hands" held sufficient. 5 Ves., 540, *Hartley vs. Hurle*.

But it may be urged, that although it be conceded that the wife under this act holds her property real to her separate use, it is only that which she acquires in the mode specified, and that that acquired by *descent* is omitted. So it is in the act of 1853, ch. 245, as to property acquired after coverture. But, by either act, the property acquired by descent is as much within the reason of the law as property acquired in any other mode. Though not within the letter if within the meaning and spirit of the act it is sufficient. "Distribution" is in both acts, and is general, and may in its plain signification apply to all property. 2 G. & J., 374. 4 G. & J., 152, 153. 9 Md. Rep., 552.

In the case of *Logan vs. McGill & Wife*, 8 Md. Rep., 470, this court has said that it was the design of the Legislature by the act of 1842, to give the wife her real estate and negroes as her sole and exclusive property, *without the necessity of the intervention of a trustee*. This clearly supports our view of its construction. If by this act she only had power to *acquire* property, it gave her nothing more than she had at common law. But this court has said it does more, that she had the power thereby to *hold directly to herself* her property,

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without the *intervention of a trustee*. What are the incidents of a wife's holding property by a trustee except for her *separate* purposes? At common law the rights of the wife were very trifling. But as the rights of property have increased, courts have looked favorably upon marriage contracts and settlements, nay they have gone further, and when the estate is a subject of *equity jurisdiction* they will always make provision for the wife therefrom. The acts of 1841 and 1842, only go one step further and break down the remaining harshness of the common law, and give to the wife her property whether it be a subject of *equity or of law*.

But if it should be determined that the act of 1842 does not apply to this case, we then insist, that under the act of 1853, ch. 245, the appellant is entitled to relief. This act was passed in obedience to the 38th section of the 3rd article of the constitution, which not only requires the passage of a law to protect the property of the wife from the debts of the husband, but to secure the same to her issue after her death. Under this provision, all legislation as to the rights of the wife, respecting her property, is proper and legitimate, and in securing her this protection can vest in her the powers of a *feme sole* over it, and pass it at once to her sole and separate use. The first section of this law provides, that "the property real and personal, belonging to a woman at the time of her marriage, shall be protected," &c. The property in controversy in this cause, belonged to the wife at the time of her marriage. This act vests in a married woman the powers of a *feme sole* over the property embraced in its provisions, and passes it to her sole and separate use. It modifies the *rights* of the husband and extends those of the wife. By its *third section*, it is not necessary to interpose a trustee, *in order* to secure to a married woman the sole and separate use of *her property*, thus securing to the wife *her property* belonging to her at her marriage, or acquired as prescribed by the first section or otherwise, to her sole and separate use, and that without the interposition of a trustee. In speaking of *her property* in this section, there is no limitation to her separate property to be enjoyed without the intervention of a trustee, but it is *her property generally*,

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as held or acquired under the provisions of this act or otherwise. In *Unger & Wife vs. Price*, 9 Md. Rep., 557, 558, this court has recently construed this act, and it is there said, that it "has materially modified the law as to the rights of the husband over the property of his wife," that "the whole scope and purpose of the law, seem to be to invest a married woman with the powers of a *feme sole*, with reference to such property as she may be authorised to hold and enjoy, whether under the act of 1853 or otherwise, to her sole and separate use."

If under either of these acts, or both construed together, the wife in this cause holds her property to her separate use, and has the powers of a *feme sole* over it, she can in this form of action obtain the relief sought by the bill, both under the 2nd section of the act of 1853, and by the law applicable to such cases generally in equity. Where no trustee is interposed, the husband in equity is considered trustee as to the wife's separate estate, and is held accountable. And in case of separation, upon the petition of the wife by next friend against her husband, the court will order a conveyance or settlement of it. 9 Ves., 582, *Parker vs. Brooke*. *Ibid*, 369, *Rich vs. Cockell*. 2 Myl. & Keene, 427, *Anderson vs. Anderson*.

It may be said that such legislation, establishing in the wife such powers and estates, is contrary to sound policy, and that it should be discouraged and limited, if possible, by a strict and rigid construction. But when we reflect that individuals can by marriage settlement, deed, will, gift or sale, create such estates, and that courts of equity have always been liberal in maintaining them, and that these courts too, when possessing power over the wife's equity, will set it apart for her separate use, it ought not to be considered wrong or unwise in the Legislature to secure to all married women that protection which is generally conceded to be wise, proper and beneficent, on the part of individuals, and which, so far from resulting badly, has been productive of great good. 2 Bland, 575, 576, *Helms vs. Franciscus*. 2 Kent, 186, 187.

2nd. If the construction of these acts of Assembly, contended for, be erroneous, then, upon the *testimony*, the appellant claims relief under the *general prayer* of the bill, by a sepa-

rate maintenance out of her own estate or otherwise. Whenever courts of equity have power, or in any way jurisdiction, over the real or personal property of the wife, they will allow to her out of it a separate maintenance founded upon the misconduct of the husband, and for sufficient ill-treatment will allow alimony. *Clancy on Husband & Wife*, 560. 2 *Bland*, 574, 576, *Helms vs. Franciscus*. Under either or both of the acts of 1842 and 1853, courts of equity have jurisdiction over the property of the wife. Whilst there are, in some respects, defined limits as to the misconduct and ill-treatment sufficient to obtain a separate allowance out of the estate of the wife for her, or alimony, still there is a wide range, as to what constitutes either, for judicial determination and discretion upon each case as it presents itself. 2 *Bland*, 568 to 576. 2 *Atk.*, 96, *Watcyns vs. Watcyns*. 2 *Vernon*, 493, *Oxenden vs. Oxenden*. *Ibid.*, 671, *Nichols vs. Danvers*. *Ibid.*, 752, *Williams vs. Callow*. The proof in this case clearly shows the misconduct of the husband to have been such, as fully to warrant the relief asked by the wife.

*Richard H. Alvey* for the appellee:

1st. The wife here is entitled to no relief whatever, either upon the case stated in the bill, or upon the proof taken. The right sought to be established by this proceeding is an extraordinary one, and goes far beyond any thing that has yet been conceded to the cause of woman's rights. To enable the wife to leave her husband at pleasure, and to take with her, in the retreat, all her property, of every kind and description, to be enjoyed by her, and managed and disposed of as her own, apart from and to the entire exclusion of the husband, and in total disregard of the marital rights, is a monstrous proposition, that, among all the wild theories of improvements, has never yet been advocated in a civilized, christian community, until the bringing of this suit, except by a few erratic and fanatical women, composing what is known as the "Woman's Rights Society." It is true, our legislation for the protection of married women, is of a most liberal character, even to the extent of doubtful propriety; but that it has gone the length of

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cutting the cords that bind society together, and of virtually destroying the moral and social efficacy of the marriage institution, is a notion not to be entertained for a moment. But such would be the inevitable result, if such a proceeding as this could be sustained. For let it once be understood that a wife, whenever she may become tired of her husband, or moved by any whim or caprice, may leave him, and take with her the whole property that she ever owned, and enjoy it exclusively, and thus become independent of that superiority and controlling power which the law has always wisely recognized in the husband, what incentive would there be for such a wife ever to reconcile differences with her husband, to act in submission to his wishes, and perform the many onerous duties pertaining to her sphere? Would not every wife, with property enough to sustain herself independently of her husband, when becoming impatient of his restraint and control, however necessarily exercised over her, take the refuge such a law would give her, and abandon her husband and her home? And thus the community would be filled with persons maintaining the unenviable character of husbands without wives, and wives without husbands, indulging in mutual hatred and animosity, bringing disgrace upon themselves, and mortification upon their families and friends.

But such a question is not to be seriously argued here, because there is no occasion for it. The acts of our Legislature, upon which reliance is placed, give no ground for the extraordinary construction placed upon them by the appellant. They were passed for the protection of society, not for the ruin of it. The act of 1841, ch. 161, 1842, ch. 293, and 1853, ch. 245, are to be taken as a series, all relating to the same subject matter, and construed together. The first of these acts only provides for the suspension of execution against the real estate of the wife during her life. The act of 1842, by its first section, provides that "Any married woman may become seized or possessed of any property real or of slaves, by direct ~~bequest, demise, gift, purchase, or distribution, in her own name;~~ and as of her own property; provided the same does not come from her husband after coverture." And the act of 1853,

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passed in pursuance of the 38th sec. of the 3rd art. of the constitution, by its first section declares, "That the property, real and personal, belonging to a woman at the time of her marriage, and all property which she may acquire or receive after her marriage, by purchase, gift, grant, devise, bequest, or in a course of distribution, *shall be protected from the debts of the husband, and not in any way be liable for the payment thereof.*" Now these acts of 1842 and 1853, admit of no difficulty in their interpretation; and they are to be construed with reference to what we must reasonably suppose was the intent of their authors. The act of 1842 simply authorizes a married woman to acquire property, real and slaves, in the particular modes therein designated, in her own name, and as of her own property, without the agency of a trustee. That is to say, that land and slaves, when conveyed to her in the way designated, expressly as her own property, and slaves are allotted to her in course of distribution, she can hold them under this act without the intervention of a trustee, as her lawful property, in the same manner that she could, before the passage of this act, through the medium of a trustee, hold them by the rules of equity, when expressly settled upon her. The act of 1853, by its terms, is an exemption law, and nothing more, declaring, as it does, that the property owned by the wife, at the time of her marriage, and such as she may afterwards acquire, in the particular modes therein pointed out, "*shall be protected from the debts of the husband, and not in any way be liable for the payment thereof.*" Thus the whole force of this law is made to operate against the creditors of the husband, and not against the husband himself. The intention of all these laws was to protect the wife against the husband's creditors, and not to effect changes in established rules of property, or to divest the husband of any of his marital rights. To do this, it would have required express words and provisions. No implication can be indulged in derogation of the sacred rights of marriage. The marital rights of the husband all remain intact and unimpaired; his right by the courtesy in the real estate, and his right to receive and enjoy the personal estate to the same extent as before the passage of these laws,

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except that such property of the wife cannot be taken by creditors for the debts of the husband, remain as formerly. *7 Md. Rep.*, 26, *Rawlings vs. Adams*. *8 Md. Rep.*, 461; *Logan vs. McGill & Wife*. *9 Md. Rep.*, 553, *Unger & Wife, vs. Price*. *4 Md. Rep.*, 280, *Peacock vs. Pembroke*. *6 Md. Rep.*, 375, *Turton vs. Turton*. *17 Missouri*, 47, *Boyce's Adm'r vs. Cayce*. But whatever interpretation might be placed on the act of 1842, it clearly has no application to this case. The wife here sets up no claim to any slaves, and the real estate belonging to her she inherited before marriage, so that it was not acquired by her as a married woman in any of the ways enumerated in that act. At the time of filing this bill there had been no child born of the marriage, but since that time, according to the proof, there has been issue born, and, by this event, the husband is clothed with an absolute estate for his own life in the land of the wife, with right to take the issues and profits thereof as his own property. *2 Kent*, 130.

2nd. The proceeding here showing that none of the property is of an equitable character, nor such as a court of equity can control or take cognizance of, and that the reduction into possession of the wife's *choses in action* is not involved, the whole property being in the absolute possession of the husband, the wife can have no claim to any equitable settlement out of such property. *3 Md. Rep.*, 1, *Wiles vs. Wiles*.

3rd. It is not every imaginary cause or slight offence that will justify a wife in leaving the house of her husband, and remaining apart from him. Mere austerity of temper, petulance of manner, or sallies of passion, if bodily harm be not threatened, will not justify such a step. It is necessary that there be a reasonable apprehension of bodily hurt, or otherwise she is entitled to no relief from a court of equity on the ground of cruel treatment from her husband. It is not pretended here that the wife was in any danger of bodily harm or injury, or that she apprehended any such treatment from her husband, but that the cruelty she experienced was harsh and mortifying language used by him towards her, whereby her feelings were wounded. Such treatment as that complained of did not, by

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any means, justify the course pursued by the wife in leaving her husband, and not being justified, she is not entitled to a divorce, even if the bill had been framed with reference to such relief. 2 *Hagg*, 35, *Evans vs. Evans*, in 4 *Eng. Eccl. Rep.*, 310. 2 *Kent*, 126. 4 *Johns. Ch. Rep.*, 187, *Barrere vs. Barrere*. 2 *Md. Ch. Dec.*, 351, *Coles vs. Coles*. 3 *Md. Ch. Dec.*, 52, *Bowic vs. Bowic*. And, for the same reason, upon a bill properly framed, asking such relief, she would have no claim for maintenance and alimony. By her unjustifiable conduct, she has forfeited all claim to such extraordinary aid from a court of equity. 2 *Story's Eq.*, secs. 1419, 1421 to 1426. 3 *Md. Rep.*, 1, *Wiles vs. Wiles*. The only grounds upon which she can ask for relief is, that she has been, *by necessity*, driven from her husband's house, and that the court has equitable control over the property; (6 *H. & J.*, 485, *Wallingsford vs. Wallingsford*; 2 *Kent*, 103;) neither of which exist in this case. Nor could she even procure the necessaries of life upon the credit of the husband, while remaining separate, having left him without sufficient cause. 2 *Kent*, 147.

4th. Conceding, however, for the sake of the argument, what is contended for on the other side, that the wife has a separate and absolute property, still the husband here being all the while ready, able, and willing to maintain his wife, and she, without sufficient reason, refusing to live with him, he would be entitled to receive the rents, income and profits of such separate estate, and the court would not deprive him of them, to make provision for the wife out of them. 2 *Ves., Jr.*, 191, *Ball vs. Montgomery*. 4 *Ves.*, 15, *Macaulay vs. Philips*. *Ibid.*, 799, *Bullock vs. Menzies*. 10 *Ves.*, 90, *Murray vs. Lord Elibank*. 1 *Daniel's Ch. Pr.*, 123 to 128. So that in no point of view can the wife receive any relief under the circumstances of this case; and the bill, therefore, was properly dismissed by the court below.

BARTOL, J., delivered the opinion of this court.

The bill in this case is filed by the appellant against her husband, the appellee, claiming—1st, an account of the rents, produce and profits of the real and personal estate belonging

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to the wife at the time of the marriage, and which are in the hands and possession of the appellee. 2nd, that the husband may be restrained by injunction from collecting the rents, profits and produce of her real estate, and from managing, controlling, renting, or leasing, or in any way intermeddling with her said real estate. 3rd, that the complainant may have the full enjoyment of her real and personal estate, to her own sole and separate use. And lastly, for general relief.

The record shows that the appellant and appellee were lawfully married on the 8th day of May 1855, and that about the 1st day of November following, the appellant left the residence of her husband, returned to that of her mother, and has ever since been living in a state of separation from him, against his consent. At the time of the marriage, she was seized and possessed of real and personal estate, which passed into his possession and control, and the claim for specific relief is based upon the construction placed by the appellant upon the several acts of Assembly of 1841, ch. 161, 1842, ch. 293, and 1853, ch. 245, and the 38th section of art. 3rd of the constitution.

It has been contended, in support of the bill, that the effect of the several acts of Assembly, and the constitutional provision to which we have referred, is to vest in a married woman a separate and independent estate in all her property, real and personal, exempt from the control of her husband, and entirely free from his marital rights.

This court has said, in the decision pronounced at the present term, in the case of *Saml. E. Schindel vs. A. J. Schindel*, (*ante* 108,) that such is not the true construction of these several acts of Assembly. In our opinion, there is nothing either in the constitutional provision, or in any of our statutes, which authorizes us to go to the extent of decreeing the specific relief asked for in this case, or to award the injunction prayed for in the bill. What has been said in the opinion of this court pronounced in the case we have referred to, dispenses with the necessity of enlarging upon this branch of the case.

It is sufficient for us to say, that the constitutional provision which declares "that the General Assembly shall pass laws necessary to protect the property of the wife from the debts of

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the husband, during her life, and for securing the same to her issue after her death," does not operate to change the rights of property acquired by marriage, so as to deprive the husband of all his marital rights secured to him by the common law. The act of 1853, which was passed in compliance with the constitutional requirement, simply carries out one branch of the duty imposed by the constitution on the Legislature; that is to say, it protects the property of the wife from the debts of the husband, but does not, in any other respect, alter or impair the marital rights of the husband therein. This view is consistent with the judgments of this court in the cases of *Turton vs. Turton*, 6 Md. Rep., 375; *Rawlings vs. Adams*, 7 Md. Rep., 26; *Logan vs. McGill*, 8 Md. Rep., 461; *Peacock vs. Pembroke*, 4 Md. Rep., 280; and *Unger & Wife, vs. Price*, 9 Md. Rep., 553.

The complainant in this case claims that, upon the testimony, she is entitled, under the prayer for general relief, to a decree for an equitable provision for maintenance out of her estate. But in no view which we can take of the facts and circumstances of this case, as disclosed in the testimony, and of the rules of law that must govern our decision, are we justified in granting the relief prayed. None of the property involved in this controversy is of an equitable character. The husband is not asking the intervention of a court of equity for the purpose of obtaining the possession; in such a case it would be in the power of the court having jurisdiction of the property to compel him to do equity by making a suitable provision out of it for her maintenance. Here the estate is legal; it is all in the absolute possession of the husband, by virtue of the marriage, and in such case a court of equity has no jurisdiction or power to disturb him in the exercise of his legal rights, or to decree any equitable settlement for the wife out of the property. This principle was expressly decided in the case of *Wiles vs. Wiles*, 3 Md. Rep., 1. But it is alleged on behalf of the appellant, that she was compelled, by the misconduct and cruelty of her husband, to separate from him, and that she is entitled to a separate maintenance out of the property. We have examined all the proof in the case, and have found

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no sufficient cause or justification for the separation of the complainant from her husband.

So far as the evidence discloses the causes which led to the complainant's alienation from her husband, there is an entire absence of any such acts of cruelty on his part, as the law declares to be sufficient to justify her separation. It is not necessary to define what is such cruelty, for in this case the acts complained of are none of them embraced within the most enlarged definition of cruelty. "The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged." This is the principle stated by Lord Stowell, who, in pronouncing the judgment of the Ecclesiastical court, in a case involving the duties and obligations of married persons, said, in language that cannot be too often repeated: "That though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes." *Evans vs. Evans*, 4 Eng. Eccl. Rep., 310.

Considering the case before us as one in which the complainant is separated from her husband without lawful cause or justification, we are of opinion that she is not entitled to a decree for separate maintenance, and the decree of the circuit court ought to be affirmed.

*Decree affirmed.*

(Decided July 20th, 1858.)

**JOSEPH NUSBAUM and JOHN BOWES, vs. MYER STEIN, and others.**

Granting an injunction is a matter resting in the sound discretion of a court of equity, and such a power should be exercised with extreme caution, and to warrant its action, strong *prima facie* evidence of the facts on which the complainant's equity rests, must be presented to the court.

Where the claim is on a written instrument in the complainant's possession, it should be exhibited with the bill, or a satisfactory reason assigned for its non-production, and a bill stating the complainant's claim to be founded on promissory notes, none of which are exhibited, and no reason or excuse given therefor, will not warrant the granting of an injunction, though the bill be sworn to.

Where the only claim on which the complainant can ask for an injunction, is a small sum on open account, of which no account is produced verified by affidavit, and the allegations of the bill show the defendant to be possessed of a large sum over and above the mortgages and conveyances attacked by the bill, a preliminary injunction should not be granted to affect the property embraced in such conveyances.

A receiver ought not to be appointed without previous notice of the application given to the defendant, unless the necessity be of the most stringent character.

**APPEAL from the Circuit Court for Baltimore city.**

This appeal was taken by the appellants, after answers filed, from an order of the court below (KREBS, J.,) granting an injunction and appointing a receiver, upon a bill filed against them by the appellees. The allegations of the bill are fully stated in the opinion of this court.

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*F. W. Brune* for the appellants:

1st. The complainants were not entitled to the appointment of a receiver nor to an injunction, because they are merely general creditors of Nusbaum, and have not prosecuted their claim to judgment and execution, nor in any other manner acquired a lien upon the appellants' property. 10 *Md. Rep.*, 500, *Uhl vs. Dillon*. 11 *Md. Rep.*, 365, *Blondheim vs.*

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*Moore. Ibid., 452, Triebert vs. Burgess. 2 Johns. Ch. Rep., 144, Wiggins vs. Armstrong.*

2nd. The bill of sale from Nusbaum to Bowes, was executed by the former, and was acknowledged and recorded according to law, and the consideration was sworn to by the latter. Being thus executed and sustained by affidavit, it furnishes at least *prima facie* evidence that the consideration was just and *bona fide*, as stated in it. In opposition to this, the complainants furnished no proof whatever, except the oath *ex parte* of Stein, one of the complainants, which does not positively state the facts sworn to, but only to the best of his knowledge and belief. Such an affidavit, unsupported by any other evidence, is wholly insufficient to counteract the positive statement made in the bill of sale, and the order of the court was, therefore, passed on proof entirely insufficient. Almost the entire claim of the complainants is founded upon *promissory notes*, none of which are produced, and no excuse given for their non-production; and as to the small balance on open account, even that is unsupported by any *affidavit* or other *proof*. That the court, upon such *proof*, ought not to have granted the injunction, is fully sustained by the case of *The Union Bank vs. Poultnoy*, 8 G. & J., 332. That the allegations of the bill do not make a case authorizing an injunction, and, above all, the appointment of a receiver, see *Adams Eq.*, 487, (n;) 1 *Paige*, 98, *New York Printing Co. vs. Fitch*; 9 G. & J., 468, *Amelung vs. Seekamp*; 4 *Gill*, 34, *Hamilton vs. Ely*; 1 *Md. Rep.*, 543, *White vs. Flannigan*; 2 *Green's Ch. Rep.*, 422, *Vanwinkle vs. Curtis*; 1 *Clarke*, 336, *Rochester vs. Curtiss*.

3rd. An additional objection to the exercise of the power exerted by the court in this case, in granting an injunction and appointing a receiver, arises from the fact that the stock of goods thus summarily taken possession of, was in Easton, and the business enjoined there carried on out of the jurisdiction of the court. 5 *Sandf.*, 613, *Grant vs. Quick*.

*Orville Horwitz and Chas. H. Pitts* for the appellees:

1st. Under the act of 1835, ch. 380, sec. 2, as construed in the case of *Sanderson vs. Stockdale*, 11 *Md. Rep.*, 563, it

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was not necessary for the complainants to have prosecuted their claim to judgment, or to have acquired any *lien* on the property before proceeding in equity to vacate these conveyances.

2nd. The allegations of the bill make a sufficient case for the interference of the court, by way of injunction and a receiver. It alleges that Bowes was not possessed of any *property or means* at the time these conveyances were executed; that *no consideration* was given therefor; and that the deeds were made by the one and accepted by the other *without consideration*, and with the *intent to defraud creditors*; that, in effect, there was a *conspiracy to defraud*. These allegations need no other proof than the sufficient oath of the complainants, and, according to the case of *Triebert vs. Burgess*, 11 Md. Rep., 452, such an affidavit as that in this case, "that the facts stated in the bill are true, according to the best of complainant's *knowledge and belief*," was held sufficient. There was also sufficient proof of the existence of the claim. But even if the non-production of the notes is an *objection*, still the bill alleges a portion of the debt to be due upon *open account*, and this was sufficient to warrant the action of the court, for if any part of the claim authorized the court to issue the order, the fact that there was another part secured by notes, could not deprive the complainants of the rights they had, under the allegation, for the *open account debt*. The court, then, having the right to interfere for the complainants' protection, how could it be done except by an injunction and a receiver? The goods were distant, and the defendants had no other means to pay our claim, and were about to dispose of the property. This is the very case contemplated in the decision in *Triebert vs. Burgess*.

3rd. The fact that the goods were at Easton, can make no difference. The case cited from 5 *Sandsford*, only says you *cannot interfere* to stop the action of another court; but here there was no other proceeding at Easton with which this could interfere.

ECCLESTON, J., delivered the opinion of this court.

The bill in this case was filed in the circuit court for the city of Baltimore, on the 15th of December 1857, by Myer Stein

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and others, complainants, against Joseph Nusbaum and John Bowes, defendants; upon which day the court ordered an injunction and appointed a receiver. From this order, after filing their answers, the defendants appealed.

It is well settled, "that the granting or refusing of injunctions is a matter resting in the sound discretion of a court of equity." 2 Story's *Eq.*, secs. 863, 959, (*a.*) This learned author, in sec. 959, (*b.*) maintains the necessity for upholding the authority of the courts to grant injunctions in a variety of cases, for the purposes of social justice. But he then says: "At the same time, it must be admitted that the exercise of it is attended with no small danger, both from its summary nature and its liability to abuse. It ought, therefore, to be guarded with extreme caution, and applied only in very clear cases; otherwise, instead of becoming an instrument to promote the public as well as private welfare, it may become a means of extensive, and, perhaps, of irreparable injustice." See the authorities referred to in the note to this section, including a quotation from Mr. Justice Baldwin's decision, in *Bonaparte vs. Camden & Amboy Rail Road Co.*, in which he says: "There is no power, the exercise of which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction." See, also, *N. Y. Printing & Dying Establishment vs. Fitch*, 1 *Paige's Ch. Rep.*, 98.

In the case of the *Union Bank of Maryland vs. Ann Poultney & J. M. Ellicott*, 8 *G. & J.*, 332, an appeal was taken from an order granting an injunction. The appellate tribunal held, that the complainants, by their bill, had not shown themselves entitled "to the high and extraordinary power of a court of equity, which had been exerted in their behalf." And that there was "no such evidence of their alleged claims as ought to have been produced to satisfy the conscience of a court of chancery of their existence." The bill stated the claims to be certificates of deposit, but they were not produced as exhibits. The court said: "To warrant a court of chancery in issuing an injunction, strong *prima facie* evidence of the facts on which the complainants' equity rests, must be pre-

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ected to the court, to induce its action. In such a proceeding, the mere oath of the party as to the existence of a debt, of which he holds in his possession the written evidence, and makes no exhibition thereof, should not be regarded by the chancellor as any proof of the debt. Where the existence of the debt depends on a written instrument, whereof the complainant is presumed to be possessed, it should be exhibited with the bill, or a satisfactory reason assigned for its non-production."

In the present case, the complainants allege Nusbaum to be indebted to them in the sum of \$2045.12, of which \$134.02 is charged as being due on open account, for merchandize sold and delivered to him, and the balance is stated to be due on four promissory notes; but not one of them has been exhibited, nor has any reason or excuse been assigned for such failure to produce them. And, according to the doctrine held in the case last referred to, these notes cannot be regarded as any proof of indebtedness on the part of Nusbaum. They must, therefore, be considered as if they were not before us; thus leaving the complainants with no further claim than that of \$134.02, on open account, on which they can base any title to an injunction.

The bill states, that on the 28th of October 1857, Nusbaum was the owner of, and carried on, four stores, one in the city of Baltimore, one in Norfolk in the State of Virginia, one in the State of Ohio, and one in the town of Easton in Talbot county in Maryland. That the goods and merchandize then in said stores were worth, in the aggregate, about \$20,000. That on the 5th of November 1857, the said Nusbaum conveyed, by way of mortgage, to A. Brown Davidson, to secure to him the payment of \$5396.72, his, the said Nusbaum's, stock of goods in the city of Baltimore, and, on the 21st day of the same month, (November,) Nusbaum conveyed, by way of mortgage, the same stock of goods to Orem & Hopkins, to secure to them the payment of the sum of \$2567.25, as appears by copies of said mortgages filed as exhibits. That on the said 5th of November, Nusbaum conveyed and transferred to said Davidson all his, Nusbaum's, stock of goods in the

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the State of Ohio, as a further security for his debt to Davidson. That the conveyances to Davidson, and Orem & Hopkins, the complainants do not mean to impeach in this suit, but refer to them as necessary to a full disclosure of their case. The bill further states, that on the 10th of November 1857, Nusbaum received from Moses Herz and J. K. Hubard, of Norfolk, in Virginia, a conveyance of a stock of goods then contained in store No. 14, in the said town of Norfolk, to secure to said Nusbaum the payment to him of the sum of \$3970.50, as appears by a copy of said conveyance filed and marked C, which stock of goods is one of the four before mentioned, the same having been previously sold by Nusbaum to Herz. The complainants also allege, that on the 13th of November 1857, the said Nusbaum conveyed, by way of mortgage, all his stock of goods in the town of Easton, aforesaid, to John Bowes, of the city of Baltimore, to secure a pretended indebtedness by said Nusbaum to said Bowes, of \$3100, and on the 16th day of said month of November, Nusbaum, by absolute bill of sale, conveyed to the said Bowes, in satisfaction of another pretended indebtedness to him of \$2950, all his, the said Nusbaum's interest in the stock of goods which had been conveyed to him, as aforesaid, by Herz & Hubard, as appears by a copy of said conveyance from Nusbaum to Bowes, filed and marked D. The two conveyances to Bowes the complainants say they believe and charge were made by Nusbaum and accepted by Bowes without consideration and fraudulently, and for the purpose of hindering, and delaying, and defrauding the complainants, who were at the date of said deeds, and still are, creditors of the said Nusbaum. The bill also alleges, that Nusbaum "has no property or assets of any kind, other than that which he has conveyed and mortgaged, as hereinbefore stated."

The complainants pray that the two deeds or conveyances to Bowes may be declared void. And in regard to the stock of goods included in the first of them, the further prayer of the bill is, that a writ of injunction might be issued, and a receiver appointed; which last mentioned prayer the court granted.

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The question before us, it will be seen, is not whether, upon final hearing, the first conveyance to Bowes should be declared void, and perpetually enjoined, or whether, after the filing of an answer, and upon a motion to dissolve the injunction, the motion should or should not prevail, but it is whether, upon the case made by the bill, a preliminary injunction should have been issued, and a receiver appointed? To such a question, in view of the *caution* and *sound discretion* proper to be exercised, we must say we think the circumstances disclosed by the bill did not justify the order passed by the court, from which this appeal is taken.

We have said the promissory notes claimed by the complainants to be due them, are not evidence in support of the injunction. Their only claim, therefore, requiring examination, is that stated in the bill to be \$134.02, on open account; the proof of which rests alone upon the affidavit of one of the complainants, swearing to the truth of the statements and averments of the bill. No account is produced, verified or sustained, either in the whole or in part, by the oath of a clerk, which species of proof it cannot be very difficult to furnish in a regular city mercantile establishment. And when the propriety of granting the injunction is based upon a claim having no more proof than is here given, it is a circumstance not to be entirely disregarded, that Bowes, the mortgagee, whose rights are to be seriously affected by the injunction, has made oath that the consideration in the mortgage "is true and *bona fide*, as therein set forth."

The statement in the bill is, that on the 28th of October 1857, Nusbaum was the owner of, and carried on, the four stores which have been mentioned, and that the goods and merchandize then in those stores were worth, in the aggregate, about \$20,000. Now, excluding the four promissory notes claimed by the appellees, if their open account and all the mortgages mentioned in the bill, and also the consideration for the absolute bill of sale to Bowes, are all added together, they will amount to the aggregate sum of \$14,148.09. Deduct this from the \$20,000, and there will remain a balance of assets, belonging to Nusbaum, amounting to \$5841.91. The

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four promissory notes amount to \$1911.10. If this should be taken from the above stated balance, there would still be \$3940.81 of Nusbaum's assets, after allowing every claim against him, mentioned in the bill.

In *Triebert vs. Burgess, et al.*, 11 Md. Rep., 461, an order appointing a receiver was reversed, because previous notice to the defendants had not been given. The day on which the present bill was filed, the receiver was appointed, no previous notice of the application having been given to the defendants; for which reason there will be a reversal of the appointment. And believing the bill does not make a proper case for an injunction, the order of the 15th of December 1857, granting the same, must be reversed.

*Order reversed and cause remanded.*

(Decided July 20th, 1858.)

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### JOSEPH KELLER *vs.* THE STATE.

A party was indicted and convicted, and *appealed* from the judgment. After the case was argued in the Court of Appeals, the Legislature passed a law *repealing* the act under which the indictment was framed, but this law was not brought to the notice of the court until the judgment had been *affirmed*. Afterwards, but at the *same term* of the court, a motion was made to strike out the affirmation and enter a judgment of reversal.

**HELD:**

That the question presented by this motion, must be disposed of as if the repealing act had been passed before the judgment was affirmed, and the motion must be granted.

A party cannot be convicted after the law under which he may be prosecuted has been repealed, though the offence may have been committed before the repeal, and the same principle applies where the law is repealed or expires pending an appeal or writ of error from the judgment of an inferior court.

An appellate court in disposing of an appeal or writ of error, must decide according to existing laws at the time of the final judgment.

The judgment in a criminal case cannot be considered as final and conclusive to every intent, notwithstanding an appeal or writ of error; execution of the sentence is not stayed if the State chooses to proceed on the

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judgment, but if the judgment is reversed, such reversal operates to discharge the prisoner from punishment.

In criminal cases where fines or penalties are imposed, an appeal will lie upon questions of law *apparent on the record*, and such questions sufficiently appear on the record, where the defence is presented in the court below by an *agreed statement of facts*,

Such agreed statements of facts, serve the same purposes and are governed by the same principles, and, by the practice in this State, have almost entirely taken the place of, *special verdicts*; like such verdicts their effect is to place the facts on the record as part thereof, and the court decides thereon as on *demurrer*.

The act of 1825, ch. 117, does not apply to demurrers and motions in arrest of judgment, nor to cases of agreed statements of facts.

#### APPEAL from the Criminal Court for Baltimore city.

In this case the appellant was indicted and convicted in the court below for a violation of the then existing license laws, and appealed from the judgment against him. After the *argument* of the case in this court, the act of 1858, ch. 414, was passed, *repealing* the laws under which the indictment was framed. This act not having been brought to the notice of the court until *after the judgment was entered affirmed*, which was done at the December term 1857, after the repealing law was passed, (11 Md. Rep., 525,) the appellant afterwards but *during the same term*, made a motion to correct this entry and to have the *judgment reversed*.

This motion was argued before LE GRAND, C. J., TUCK and BARTOL, J.

*Charles F. Mayer* for the motion:

The principle is well settled, that if a statute intervenes while a prosecution is pending and repeals the statute under which the prosecution is had, no judgment can be pronounced against the offender. This principle equally applies to a case where there has been a verdict of guilty, and a repeal before judgment as where the proceedings are open before verdict. Some question might arise, whether the judgment should be reversed, rendered on a penal statute where the *repeal* takes place after judgment, and pending the appeal or writ of error.

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There would seem to be no reason against the reversal, since the writ of error or appeal keeps the judgment in uncertainty, and prevents its being definitive or a thing consummate, and since *punishment* is as much a part of the *proceedings* under a penal statute, as the action on the indictment antecedent even to verdict, and to affirm a judgment is to pronounce a *present decision*, as to the present and actual law. If the law be repealed the judgment of *affirmance* falsifies the law, and declares that to be law which is not law any longer.

In 1 *Cranch*, 104, *United States vs. Schooner Peggy*, the court's opinion, in the last sentence of it, delivered by C. J. Marshall, concludes the point we are maintaining in declaring: "The court must decide according to existing laws, and if it be necessary to set aside a judgment, *rightful when rendered*, but which cannot be affirmed but in violation of law, the judgment must be set aside." The judgment there of the circuit court was set aside, and on writ of error, in consequence of an intervening change of law (virtually a repeal) after the decree or judgment of the circuit court had been passed. Subsequent cases in 5th and 6th *Cranch*, 281, 329, looked, on deciding the same point, to the proceeding being by appeal and in admiralty and as making a new case in the Supreme Court, but, in the *Peggy's case*, the review was under a writ of error, and the principle settled there covers any case in the appellate tribunal no matter how carried thither. Thus, too, in 14 *Eng. Law & Eq. Rep.*, 124, *Regina vs. Denton*, the court determines that where a law is repealed, it is, as to any penal procedure, (punishment or proceedings in the prosecution,) to be regarded as if it had never existed, *quodad* the action of the court adjudging in the case. Besides this, and in confirmation of the reasoning of the position, the benefit of which we claim, a repeal of the penal statute is a *renunciation* by the State of the penalty. So has the Supreme Court of the United States determined, in the case of *The State of Maryland vs. The Balt. & Ohio Rail Road Co.*, 3 *How.*, 534. Ch. J. Taney there says, that a repeal of an act is a *remission of the penalty* in the particular case of prosecution. See, too, 13 *How.*, 429, *Norris vs. Crocker*. In this case all penalty was thus removed by the State as against the appellant.

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It is idle to cite authorities to show that a judgment appealed from or carried up under writ of error is not a definitive judgment, and, therefore, practically not a complete judgment, although it be not merely interlocutory in the technical sense. The case of a party is as much *sub judice* still, and *merely*, while in the appellate tribunal, as it was while trying or before verdict and judgment in the inferior court. A case too, it may be said, absolutely goes to our Court of Appeals, and is entirely in the possession of that court, since even execution may issue on an affirmed judgment from the Court of Appeals. The cases on this doctrine generally will be found in 1 *British Crim Law*, sec. 103, and I may on this head cite 1 *Binnay*, 601, *Commonwealth vs. Duane*; 1 *Wm. Bl. Rep.*, 451, *Miller's Case*; 3 *Burr.*, 1456, *Rex vs. Justices of London*; 11 *Pick.*, 350, *Commonwealth vs. Marshall*; 3 *Dallas*, 378, *Hollingsworth vs. Virginia*; 4 *Dallas*, 372.

No counsel appeared for the State.

Tuck, J., delivered the opinion of this court.

It appears that, on the last day of the session of 1858, the Legislature passed an act, "to regulate the issuing of licenses to ordinary keepers and traders," (ch. 414,) by which the acts under which this indictment was found and the appellant convicted in the court below, were repealed. This law had not been passed when the cause was argued, and was not brought to the notice of the court until after the judgment had been affirmed, when a motion was made, within the term, to correct the ruling of the court, and enter a judgment of reversal. The question, now submitted, must be disposed of as if the act of 1858 had been passed before the judgment was affirmed.

If the record is properly before us the motion must be granted. It is well settled, that a party cannot be convicted, after the law under which he may be prosecuted has been repealed, although the offence may have been committed before the repeal. *Dwarris*, 670. 1 *Kent*, 465. *State use of Wash. Ct., vs. Balto. & Ohio Rail Road Co.*, 12 *G. & J.*, 399.

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The same principle applies where the law is repealed, or expires pending an appeal on a writ of error from the judgment of an inferior court. It has frequently been recognized in admiralty causes, where property was seized and condemned, on the ground that the repeal of the law before the decision in the court above removed the penalty, and that the court in disposing of the appeal or writ of error, must decide according to existing laws at the time of the final judgment. 1 *Cranch*, 103. 5 *Cranch*, 281. 6 *Cranch*, 203. 3 *Peters*, 57. Ch. J. Marshall states the doctrine generally, and not as applicable only to condemnations in admiralty. There seems to be no reason for saying, that it shall not govern in other cases of penalty or fine, when pending causes are not excepted in the repealing act. And we may consider that the Court of Appeals so regarded this doctrine, for in the case of *State use of Washington County, vs. The Rail Road Company*, 12 G. & J., 437, where the defendant claimed the benefit of an act of Assembly releasing a penalty, the court relied upon what was said in 5 *Cranch*, 283, viz: "The court is therefore of opinion, that the cause is to be considered as if no sentence had been pronounced; and if no sentence had been pronounced, it has been long settled on general principles, that after the expiration or repeal of a law no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." The judgment in a criminal cause cannot be considered as final and conclusive to every intent, notwithstanding the removal of the record to a superior court. If this were so, there would be no use in taking the appeal or suing out a writ of error. To be sure it does not operate to stay the execution of the sentence, if the State chooses to proceed on the judgment; but, when decided in favor of the accused, the reversal will operate as far as possible for his relief. If he be undergoing punishment according to the sentence pronounced he will be discharged, as in the cases of *Black*, 2 *Md. Rep.*, 376, and *Cochrane*, 6 *Md. Rep.*, 400. And so if the law be repealed, pending the appeal or writ of error, the judgment will be reversed, because the decision must be in accordance with the

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law at the time of final judgment. And recently, in the case of *The State use of Balto. City, vs. Norwood, et al.*, at this term, (*Ante*, 195,) this court recognized and adopted the language of Ch. J. Marshall, in 1 *Cranch*, 110, to the effect, that, "if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." See, also, 3 *Howard*, 534, where the Chief Justice said, that "the repeal of a law imposing a penalty is of itself a remission of the penalty."

We are next to inquire as to the appellant's standing in this court. The case was decided by the court below, on an agreement of facts. The objection on the part of the State, (see 11 *Md. Rep.*, 529, 530,) is, that there should have been a demurrer or motion in arrest of judgment, and that the record should have been brought up by writ of error.

It was decided in *Queen vs. The State*, 5 *H. & J.*, 232, that, in criminal cases imposing fines or penalties, an appeal will lie upon questions of law apparent on the record. Act of 1785, ch. 87, sec. 6. *Rawlings vs. State*, 1 *Md. Rep.*, 127. As this record shows a judgment imposing a fine, the appeal will not be dismissed, if the case, was so presented in the court below as to place the appellant's defence upon the record. The indictment being good in law, there was no ground for a demur-  
rer or motion in arrest of judgment.

If the defence, that the defendant sold lager beer of his own brewing, had been pleaded, and the State had demurred to the plea, the point would have appeared by the record. Instead of this mode of proceeding, however, the State and the accused made an agreement of facts, according to a practice which has obtained in this State for many years, by which the case was submitted to the court. The office of the court was, to declare the law upon the facts admitted. This proceeding, with us, has almost entirely taken the place of special verdicts, as being more convenient, yet serving the same purposes, and is governed by the same principles. *Ev. Pr.*, 316. 2 *H. & G.*, 118. Like special verdicts, the effect is to place the facts on the record, as part thereof, on which the court decides, "as in case of demurrer." *Steph. Pl.*, 124, (*Ed. of 1831.*) *U. States*

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*vs. Eliason*, 16 Peters, 291. *Stimpson vs. Balto. & Susquehanna Rail Road Co.*, 10 Howard, 329. When an appeal is taken, the court above decides upon the law of the case, without being restrained by the act of 1825, ch. 117. As that act does not apply to demurrers and motions in arrest of judgment, and as agreed statements present the facts, as on demurrer, the act has never been considered as applicable to such cases. There have been many such cases in this court since the passage of the act, and no question ever made as to the power of the court to revise the judgments. 2 H. & G., 118. 1 G. & J., 390. 3 Do., 158. 6 Do., 259, and others. The same is the law in criminal prosecutions. In 1 Ch. Crim. Law, 642, it is said: "the jury have a right, in all cases whatever, to find a special verdict by which the facts of the case are put on the record, and the law is submitted to the judges," and the same rules are to be observed, as in civil suits, in stating the facts. If, in civil proceedings, a different form has been generally adopted, for submitting the law to the court, why may not the same mode be resorted to in prosecutions? The considerations of convenience and facility of trial, apply to one as well as to the other, and, we think, the same practice should be allowed in both classes of cases. We have no difficulty in saying, that the proceedings below placed the facts upon the record, as a part thereof, by which the law of the case must be determined, and, that being so, that the appeal lies under the act of 1785, ch. 87, sec. 6.

In answer to the argument on the part of the State, (11 Md. Rep., 527,) as to what was said in 1 Md. Rep., 127, of the case of *Lancaster vs. The State*, it may be observed, that that agreement was entered into in the Court of Appeals, and not in the court below, and was not part of the case as decided. It was a judgment on confession, without demurrer, or motion in arrest, or agreement of facts in the inferior court, and the question of law to be decided did not appear upon the record. That being so an appeal did not lie.

*Motion granted and judgment reversed.*

(Decided July 20th, 1858.)

**MATILDA E. GREEN vs. WM. H. PURNELL, Comptroller of the Treasury.**

The Comptroller of the Treasury, being clothed by the constitution with the exclusive power of adjusting and settling public accounts, is not a mere ministerial officer, and cannot, therefore, be compelled, by mandamus, to perform any act, in the discharge of his duties, which involves the exercise of judgment and discretion.

A mandamus cannot issue in any case where discretion and judgment are to be exercised by the officer; it can be granted only where the act required to be done is merely ministerial, and the party is without any other adequate remedy.

The question, who is entitled to an appropriation in the general appropriation act, of a certain sum for "the rent of house for fire-engine," under a certain state of facts, and under certain acts and a resolution of the Legislature, is a question for the Comptroller to determine, in the exercise of his judgment and discretion.

**APPEAL from the Circuit Court for Anne Arundel county.**

This appeal is taken from an order of the court below, dismissing a petition filed by the appellant for a rule upon the Comptroller to show cause why a mandamus ought not to be issued, requiring him to issue his warrant upon the Treasurer for payment to the petitioner of the sum of \$100, for rent of certain premises by her to the State, for the use of the State engine. The facts of the case are fully stated in the opinion of this court, as also in the following opinion of the court below, (BREWER, J.,) delivered upon passing the order appealed from:

"This is an application for a mandamus to the Comptroller of the Treasury to pay to the petitioner the sum of \$100, which is claimed to be the rent for the year 1857, of an engine house rented by her to the State. To the rule to show cause, the defendant put in an answer, and the matter has been submitted in that state of the case, without any traverse or testimony.

"The facts, as admitted by the answer and alleged by the defendant, appear to be, that resolution No. 9, of the session of 1849, appropriated to Mrs. Matilda E. Green \$50, for the rent of an engine house, to be paid on the 1st of December of

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that year, and for every year thereafter, so long as the same should be rented to the State, but does not state the day of the commencement or end of the renting. Regular successive appropriations were made every year, of the same sums, for the rent of an engine house, without specifying to whom, until 1856, when \$100 was appropriated, also without specifying to whom it was to be paid. Mrs. Green received the rent of \$50 up to the 1st of December 1856, and her house was occupied by the State up to the 1st of January 1857, when it was removed by the Librarian, who, by the act of 1856, ch. 314, had the superintendence of the engine, and placed it elsewhere.

“The petitioner’s counsel considers the resolution of 1849 as the acceptance of a lease from Mrs. Green of her engine house by the State for the term of one year, and so on from year to year, at \$50 per annum, and which could not be terminated by the State without legal notice to quit. Whether the resolution could be considered as a contract of that nature at the commencement, or could not be terminated by the State without the legal notice required on such contracts of renting between individuals, or whether it was not terminated by the act of 1856, ch. 328, appropriating double the amount for the same purpose, without specifying to whom it should be paid, it seems to me unnecessary to determine. This court cannot entertain suits against the State by individuals, in the usual or ordinary form, or *by mandamus* to compel the State, through any of its public officers, to fulfil its contracts. Where an unquestionable appropriation has been made by the State, of any portion of its funds, to be paid to any individual, by the constitution, laws and resolutions of the Legislature, the Comptroller is bound to issue his certificate to the Treasurer for its payment, and if he refuse, he may be compelled by *mandamus*. But when any claim is made against the State, on contract or otherwise, it is the duty of the Comptroller to investigate it, and to determine whether he has sufficient authority given him to decide upon its validity, and to issue a certificate for its payment. This court cannot undertake to sit in judgment upon his decisions.

“The question, then, is, whether the various acts and reso-

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lutions of the Legislature, as referred to, can be considered as an appropriation of the sum of \$100 to be paid to Mrs. Green, for the use of the engine house for the year 1857? The resolution of 1849 appropriates \$50 only for the rent for that year, positively to be paid to her, and the same sum for every subsequent year that the house should be rented by the State from her. The house was rented and occupied up to 1857, and the rent paid accordingly. The act of 1856 appropriates \$100 for the payment of rent for the engine house for 1857, but does not direct it to be paid to Mrs. Green, nor does it refer to the resolution of 1849, or appear to be connected with it, the latter being for \$50, and the former for \$100. If rented by her under the act, it would be a new renting, on different terms.

"The Librarian, who had charge of the engine, would seem to be the proper person to rent the house, and to certify the fact in such form as would satisfy the Comptroller. Admitting the resolution of 1849 to be still binding on the State as a renting, for want of notice to quit, it could only be an appropriation for the sum there specified to be paid under that renting and appropriation, and the petitioner could only claim the \$50. If she claims under the act of 1856, it is a new appropriation, and there must be a renting—an actual renting—not by implication or construction. All the appropriations for this purpose, since 1849, depended on the subsequent renting from her. The rent was then payable to her by the terms of the resolution. After the act of 1856, there was no appropriation of money to any individual; it was appropriated to a purpose. The individual to receive it depended his right to do so upon a contract to be made thereafter with some person authorized to rent. That person, I think, was the Librarian; he was authorized to rent the engine house, and to direct the rent to be paid to the landlord, or to receive it and pay it to him. The landlord had no right to require the Comptroller to pay the money to him, as an actual appropriation by law to him. If the rent is claimed from the State as on a contract with the State, or its legally authorized agent, and not an appropriation to the claimant, the proper accounting officer must

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judge of its validity. If he considers it invalid, and declines to pay, the claimant must resort to the appropriating department of the State. There is no provision made for suing the State in any form."

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*Thos. S. Alexander* for the appellant:

1st. The house and premises having been rented from the appellant by the Legislature, from year to year, so long as both parties should please, it was not competent for any other authority than the Legislature to determine that tenancy.

2nd. Under the terms of the renting, the tenancy was determinable only after six months' notice given prior to the end of a given year.

3rd. The year commencing from the 1st day of December, and terminating with the same day in the succeeding year, and it being admitted that the State remained in possession of the premises until the 1st day of January 1857, the appellant is entitled to treat the State as her tenant for the whole year 1857, and, therefore, to claim the sum of \$100 appropriated by the act of 1856, ch. 328, for rent of house for State engine.

4th. There being an express appropriation of the money *for the object*, and clear evidence of the obligation of the State to pay the money to the appellant, it was the duty of the Comptroller to issue the warrant in her favor, as demanded by her, and on his refusal to do so, he may be compelled thereto by *mandamus*. 4 Md. Rep., 191, *Thomas vs. Owens*. 12 Pet., 609, *Kendall vs. Stokes*. 14 Pet., 497, *Decatur vs. Paulling*. 17 How., 225, *United States vs. Seaman*. Ibid., 284, *United States vs. Guthrie*. 31 Eng. C. L. Rep., 72, *King vs. Lords Commissioners of the Treasury*. 4 Eng. Law & Eq. Rep., 277, *Regina vs. Lords of the Treasury*.

*N. Brewer, of Jno.*, for the appellee:

1st. The act of 1856, ch. 314, gives to the State Librarian the custody and superintendence of the engine, and authorizes

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him to rent the engine house. The language of the act, and the rules by which statutes are to be interpreted, require this construction to be given it. 3 G. & J., 66, *Blizzard vs. Jacobs*. 2 H. & J., 167, *Beall's Lessee vs. Hdrieood*. 4 G. & J., 1, *Canal Company vs. The Rail Road Company*.

2ad. The act of 1856, ch. 328, appropriates \$100 for the payment of the rent of engine house for the year 1857. The appropriation is made, not to be paid to Mrs. Green, or any other individual, under this act, but the money is appropriated to a purpose, and the individual to secure it must do so through a contract with the Librarian, who was authorized to rent the engine house, and direct the rent to be paid to the landlord, or to receive it and pay it to him.

3rd. The petitioner has shown no legal claim to the appropriation of \$100 made for the rent of house for fire engine for the year 1857, and had no right to require the Comptroller to pay the money to her, as an actual appropriation to her.

4th. This action is a suit against the State for an alleged violation of contract, and this court cannot entertain suits against the State by individuals in the usual or ordinary form, or by *mandamus*, to compel the State, through any of its public officers, to fulfil its contracts.

ECCLESTON, J., delivered the opinion of this court.

The appellant filed a petition in the circuit court for Anne Arundel county, praying for a rule upon the Comptroller of the Treasury to show cause why a *mandamus* should not be issued, commanding him to grant the petitioner a warrant upon the Treasurer of the State, requiring and authorizing him to pay unto the petitioner the sum of one hundred dollars, "which is in and by the act of the General Assembly of Maryland, passed at January session 1856, chapter 328, appropriated for the rent of house for fire-engine."

The rule to show cause was granted, and the Comptroller answered the same. Without further proceedings, the matter being submitted by the parties, the court passed an order dismissing the petition; from which order this appeal is taken.

The appellant's counsel has referred to the case of *Thomas*

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*vs. Owens*, 4 Md. Rep., 189, as an authority which fully sustains the present application. But we do not so consider it. That is a very different case from this. There the petition asked for a *mandamus* requiring the Treasurer of the State to pay the Comptroller, upon his warrant, the amount of his salary, which is regulated by the constitution, and, of course, duly appropriated by law.

At page 228, the court refer to the 2nd and 3rd sections of the 6th article of the constitution, for the purpose of defining the principal duties of those two officers. It is there said: "From these two sections it appears, 1st, that it is the duty of the Treasurer to *disburse* the public moneys on the *warrant of the Comptroller, and not otherwise*; and 2nd, that the duty of *adjusting* and *settling* all public accounts is imposed upon the Comptroller.

"Looking to these provisions of the constitution, it appears to us that the power of *adjusting* and *settling* public accounts is *exclusively* conferred on the Comptroller, and, in this particular, it is the duty of the Treasurer to respect such adjustment and settlement, and, on warrant of the Comptroller, to pay the amount."

The court further say: "The Comptroller is chosen *immediately* by the people; the Treasurer by their representatives; and the former have deemed it advisable to entrust the officer of their *own choice* with duties formerly performed by the Executive and Treasurer."

It is likewise said: "Where there is an appropriation, and a proper warrant drawn by the Comptroller and presented to the Treasurer, his duty is purely *ministerial*; all he has to do in such a case, is to count out the money; an act ministerial, and nothing else. If he refuse to perform it, the law will compel him." This very explicitly announces the character in which the Treasurer is called upon to act, where there is an appropriation, and the Comptroller has issued his warrant for the same. But the court have drawn a manifest distinction between the authority and duties of those two officers. And surely the language used in reference to the adjustment and settlement of public accounts by the Comptroller, cannot be

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understood as meaning, that in the discharge of such duties he merely acts ministerially; for they require the exercise of judgment and discretion.

In the case of *Amos Kendall, Postmaster General of the United States, vs. Stokes*, 12 Pet., 524, the Supreme Court held, that by *mandamus* the Postmaster General might be compelled to allow Stokes a credit, the amount of which had been regularly ascertained by an award of the Solicitor of the Treasury, under authority of an act of Congress. The court did not consider the *mandamus* as designed to control the Postmaster General in the discharge of his official duties, partaking in any respect of an executive character; but to enforce the performance of a mere *ministerial* act, which neither he nor the President had any authority to deny or control.

That case was referred to in *Decatur vs. Paulling*, 14 Pet., 516, 517, where it is explicitly stated there was a difference of opinion in the Supreme Court in the previous case, in relation to the power of the circuit court to issue the *mandamus*. But respecting the act to be done, there was no difference of opinion. The court were unanimously of opinion that in its character the act was merely ministerial.

The case of *Kendall vs. Stokes*, was relied upon as authority to sustain the application for a *mandamus* in *The United States vs. Seaman*, 17 How., 225, but without success. The Supreme Court speak of the award in favor of Stokes, made by the Solicitor of the Treasury in that case, as an official act authorized by act of Congress. And the award having determined the amount of credit to which Stokes was entitled, and the same being reported to the Postmaster General, the court say: "He was merely to record it. His duty under that act of Congress, was like that of a clerk of a court, who is required to record its proceedings; or of an officer appointed by law to record deeds which a party has a right by law to place on record; or of the Register of the Treasury of the United States to record accounts transmitted to him by the proper accounting officers to be recorded. The duty, in such cases, is merely ministerial; as much so as that of a sheriff or marshal to execute the process of a court."

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The court then add: "This was the point decided in *Kendall vs. Stokes*, and the subsequent cases have all been upon the same principles. They are in no degree in conflict with it; on the contrary, they have followed it."

On page 230, of 17 *How.*, the Chief Justice, speaking for the court, refers to various cases decided by the Supreme Court, in regard to the power of the circuit court of the district to issue writs of *mandamus* to an officer of the Government in Washington. The rule to be gathered from all these cases, he considers to be too well settled to need further discussion. He then says: "It cannot issue in a case where discretion and judgment are to be exercised by the officer; and it can be granted only where the act required to be done is merely ministerial, and the relator without any other adequate remedy." *Kendall vs. Stokes* is the only case referred to in which the application for the writ was successful; and that application the court sustained, because the Postmaster General was required to do an act in which he was not authorized to exercise any discretion or judgment.

In the opinion of the court, as delivered by the Chief Justice, in *Decatur vs. Paulding*, at page 515, it is said: "The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by *mandamus*, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties." See what is said of *Mrs. Decatur's case*, in *Brashear vs. Mason*, 6 *How.*, 101.

The following we understand to be a correct statement of the facts in the present case:

By resolution No. 9, passed on the 29th of January 1850, during the December session of 1849, the Legislature directed the Treasurer "to pay to Mrs. Matilda E. Green the sum of fifty dollars, on the first day of December, one thousand eight hundred and fifty, for the yearly rent of a house for the State engine, and also the same sum on the first day of December in each and every year thereafter, so long as the said house is

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rented by this State from the said Matilda E. Green." Neither this resolution, or any thing else, states the day on which the renting commenced. By different acts of the Legislature, regular appropriations were made for the rent of an *engine house*, without specifying to whom to be paid. Mrs. Green received her rent up to the 1st of December 1856, inclusive. Her house was occupied by the State up to the 1st of January 1857, when the fire engine was removed by Llewellyn Boyle, who, as superintendent of the same, placed it elsewhere.

By the act of 1856, ch. 314, Lewellyn Boyle, the appointee of the Legislature, as State Librarian, was charged with the general superintendence of the public buildings and grounds within the State House circle, as well as the *fire apparatus* belonging to the State.

In the act making appropriations for the support of government, passed at the session of 1856, ch. 328, the Legislature appropriated "to the rent of house for fire-engine, one hundred dollars," not saying to whom it was to be paid.

The appellee says, in his answer, that on the 1st of January 1857, he received notice in writing from Llewellyn Boyle, the superintendent, that he had rented of J. Wesley White, of Annapolis, an engine house, where the State engine would be kept in the future; which notice is filed as part of the answer.

The appellee also says, he has been notified by Llewellyn Boyle, the superintendent, "not to issue a warrant for the rent of a house for the State engine, for the year 1857, to the said Matilda E. Green, and has authorized and directed this respondent to issue the same to John W. White, of Annapolis."

On the 2nd of December 1857, Mrs. Green applied to the Comptroller for his draft or warrant upon the Treasurer for the payment of the sum of \$100, alleged by her to be due the day previous, for the rent of her house. But the Comptroller refused to issue a warrant, denying her right to claim one.

The act of 1856, ch. 328, under which the appellant claims \$100, is not, in terms, an explicit appropriation of that, or of any other sum in her favor. Her name is not mentioned

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therein. And the act simply appropriates \$100 "to the rent of house for fire engine."

The appellant contends that the resolution of 1849 created a lease between the State and herself, which could not be terminated by the State without such previous notice of an intention to quit, as the law requires in similar cases of renting; that she had received no sufficient notice to terminate the lease sooner than the 1st of December 1857. And inasmuch as the engine had been kept in her house during the month of December 1856, she insists that although the engine may have been removed on the 1st of January following, and was subsequently kept elsewhere, still the State was bound to pay her a year's rent, ending on the 1st of December 1857, and therefore she claims the \$100.

But conceding that the resolution alluded to did create a lease, which was not legally ended until the date stated above, it is very certain the annual rent provided for in that lease was only fifty dollars, and not *one hundred*. And we have seen that the Comptroller had been notified by the superintendent of the engine that he had rented a house for the same, for the year 1857, from J. W. White, who was entitled to the rent, and that Mrs. Green was not.

These remarks are not to be understood as any intimation of an opinion on our part that the appellant is not entitled to compensation from the State; but the views expressed are intended to show that she is not entitled to a *mandamus*. We think her application does not require of the Comptroller a merely ministerial act, but under the circumstances, the question whether he should grant her a warrant for her alleged claim of \$100, necessarily involves the exercise of judgment. And believing this to be the case, we must affirm the order of the circuit judge.

*Order affirmed.*

(Decided July 20th, 1858.)

LE GRAND, C. J., dissented.

I assent to the correctness of the principles set out in the opinion of my brothers, and also to the accuracy of its narrative

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of the facts of the case, but dissent from the application given to them. If there was a contract with Mrs. Green for the use of her building, it was no more competent to the agent of the State to terminate it contrary to the law, than it would have been to any other person to have done so. The constitution of the United States is as binding on the several States as on individuals; neither can impair the obligation of a contract. As I understand the opinion of a majority of the court, it does not deny the validity of the claim of Mrs. Green, but, on the contrary, admits it. The objection is only as to the *remedy* invoked, to wit, a *mandamus*; a majority of the court holding that this writ cannot go against the Comptroller on a case like the present, and that the claimant must appeal to the Legislature. This opinion is based on the idea that the duty which the Comptroller has to perform in regard to this particular claim is judicial, not ministerial in its character. If this were so, I would concur in the conclusion to which they have come, but I am very clear in my conviction that this application is wholly free from the objection urged against it.

I of course hold, that the State cannot be sued, but this is not a suit against the State. The case is simply one of an appropriation which the Comptroller, in obedience to the legislative will, is bound to pay to the party entitled to it. So far as the performance of his duty is concerned, in this regard, there is nothing requiring of him the exercise of the judicial function. I grant, where he is required to exercise a judicial discretion, that his conduct cannot be controlled by a writ of *mandamus*; but, to my mind, it is palpably plain that the Comptroller has no right to withhold the payment of an appropriation, and that if he does so, that he can not only be coerced by *mandamus*, but is liable on his official bond for non-performance of duty. To allow to the Comptroller, on his mere caprice, to withhold the payment of all appropriations, would be to make him the supreme authority in the State; in truth, it would be to confer upon him the power to stop the wheels of government, and bankrupt its credit. He has no such power. He is only exempted from the control of the courts when he is in the exercise of a judicial power; but

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when he has nothing to do but a ministerial act, he is just as liable to their decisions as any other public officer. Here his whole duty was purely ministerial, nothing more. The engine was in the house of the appellant, where it had been for years, when the Legislature appropriated one hundred dollars "*to the rent of house for fire engine.*" What house?

The State was the tenant of the appellant, recognized as such not only by past payments of rent, but by express legislative declaration. It not only had not the power unlawfully to terminate the tenancy, but evinced, on the contrary, the strongest disposition to continue it by increasing the rent. The tenancy being fixed, and the rent appropriated, there was nothing to be done by the Comptroller but to issue his warrant. He was called upon to do nothing judicially; his required action was wholly and only ministerial, and, as such, liable to be commanded by the process of the courts. This is a case where it is conceded the claimant is entitled to the money claimed, and where an appropriation has been made, and yet the refusal of the Comptroller, under the decision of my brothers, to pay the money, forces the appellant to apply to the Legislature for redress, which, if granted, the Comptroller could again defeat the legislative will, by refusing a compliance therewith. This, in my judgment, is the effect of the decision of a majority of the court. To such a doctrine I cannot yield my assent.

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### THE STATE *vs.* FRANCIS DUNNINGTON, and others, Commissioners of Charles County.

The duty imposed upon the county commissioners by the act of 1831, ch. 281, sec. 8, of taking bond with sufficient security from the county collectors, for the collection of the colonization tax imposed by that act, is a *judicial* and not a *ministerial* duty, requiring the exercise of *judgment* and *discretion*, and a mere *error of judgment* in the discharge of this duty, gives the State no right of action against such commissioners.

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**APPEAL from the Circuit Court for Charles county.**

This was an action on the case brought on the 28th of March 1855, by the State against the appellees, as late commissioners of Charles county.

The declaration complains, that whereas, on the first Monday of October 1840, the defendants were, by the act of 1839, ch. 73, duly elected commissioners of the tax for Charles county, and as such, by the act of 1831, ch. 281, sec. 8, entitled "An act relating to people of color in this State," did levy on the assessable property of Charles county, clear of expenses of collecting the same, the sum of \$446.66; and the said State further says, that the sum so levied as aforesaid was duly delivered for collection to Allison Roberts, late of said county, deceased, on the 21st of September 1842, he, the said Roberts, having been duly appointed collector in and for Charles county, by the commissioners aforesaid, before the delivery of the sum aforesaid; and the State further says, that by the act of 1831, ch. 281, aforesaid, it was made the duty of the commissioners aforesaid to take bond from the said Roberts, as collector of the sum so levied and delivered, with sufficient security for the faithful collection and payment thereof into the treasury of the State; and the State further says, that the commissioners aforesaid did not take from the said Roberts, as collector as aforesaid, a bond with sufficient security, as they were required to do by the act aforesaid; and the State further says, that said Roberts did not collect and pay into the State Treasury the sum so levied as aforesaid, and delivered to him for collection, and inasmuch as the said Roberts was not required to give bond with sufficient security by said commissioners, as by the act aforesaid they were required to do, a total loss has accrued to the State of the sum so levied and delivered as aforesaid, with interest thereon; and the said State saith, that by reason of the premises aforesaid, and the failure of the commissioners aforesaid to take bond with sufficient security, as they were by the law required to do, the said commissioners have not performed their duty according to law, but have been guilty of such negligence in office that the said State has sustained great

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damage, to wit, the sum of \$1500, and thereupon it brings suit, &c.

To this declaration the defendants demurred, which demurrer the court (CRAIN, J.,) sustained, and gave judgment for defendants for costs, and thereupon the State appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BARTOL, J.

*Robert S. Reeder*, State's Attorney for Charles county, for the State:

By the act of 1839, ch. 73, the name of the levy court was changed to that of commissioners, and all the powers which the former possessed were transferred to the latter. By the act of 1831, ch. 281, sec. 8, the levy courts or commissioners were authorized annually to levy a certain amount on each county, and on Charles county the sum levied was \$446.66, and it was provided that this amount shall be collected in the "same manner and by the same collector or collectors as county charges are collected. The levy courts or commissioners, as the case may be, respectively taking bond with sufficient security from each collector, for the faithful collection and payment of the money in the treasury of the eastern or western shore, as the case may be, at the time of paying other public moneys to and for the use of the State." According to the case of *State vs. Waters, et al.*, 1 Gill, 302, a specific bond was necessary, and this money could not be collected on the general bond of the collector. The declaration in this case avers the proper appointment of the commissioners, and of the collector, the failure of the former to take the bond, as required by the act of 1831, ch. 281, sec. 8, and of the latter to collect and pay over the money as it was levied and placed in his hands for collection. The defendants demurred generally, and thereby admitted the facts as averred in the declaration, and the question now arises, are the commissioners responsible for the amount of the money lost to the State through neglect in not taking bond? have they so far disregarded the requirements of

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the law, and been so far guilty of official negligence and misfeasance as to make them liable for this tax?

In 1 *Evr. Harris*, 358 to 370, the court will find precedents of declarations against officers for official negligence and misfeasance, and among them are actions against a sheriff for not collecting fees, and for levying more fees than the law allows on writ of execution, for bringing *fi. fa.* on more goods than necessary, and for various other cases of official misconduct, either wilfully or through neglect. In 1 *Saund. Pl. & Ev.*, 337, under the title "*Case*," it is said: "Case affords a most extensive remedy for all *breaches of duty ex quare contractu*; and from a given state of facts the law raises an obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, an action on the case founded in tort is the proper form." In this case the commissioners were duly elected or appointed by the popular power, and they professed to become the officers or agents of the people, and there was a contract to perform a duty and receive compensation. In this position there was a legal obligation upon them to perform a positive duty, as specified and required by the law, and it seems to me, if, through negligence or mismanagement, they caused a loss to the State, the employer, they are clearly liable. On the same page of *Saunders* it is said: "Case often lies as a concurrent remedy with *assumpsit*, . . . . it by no means follows, that because a promise may be implied by law, the action on the case, which is in terms founded on the *breach of that duty from which* the law implies a promise, may not also be maintainable." Either *case* or *assumpsit* may be maintained against one when a legal duty rests upon him, and he violates that duty. But, on the same page of the same book, we find language, it seems to me, clearly embracing this case. The author says: "And in *Govett vs. Radridge*, 3 *East.*, 70, Lord Ellenborough observes, there is no inconvenience in suffering the plaintiff to allege his gravamen as consisting in a *breach of duty* arising out of an employment for hire, and to consider that *breach of duty* as tortious, instead of considering the same circumstances as forming a *breach of promise implied from the same consideration of hire*." And the author upon

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this remarks: "But not only in the case of implied, but in express contracts, if they create a duty, case will lie; for although there be an express contract, a party is not bound to resort to that contract, but he may declare on the tort, and say that the party has neglected to perform his duty." Under the title "*Assumpsit*," page 110 of the same work, it is said: "*Assumpsit* will lie for non-feasance, misfeasance, or malfeasance, for where a defendant has been guilty of a tortious neglect of his duty, the plaintiff may waive the tort and rely on the circumstances as forming a breach of promise implied from some consideration of reward." In *Angel on Lim.*, 43, it will be seen that the United States maintained an action of *assumpsit*; and on page 147, it is said, an action of *assumpsit* may be maintained for malfeasance, misfeasance, and non-feasance, and on page 89, the doctrine is still more distinctly stated, that *assumpsit* lies to recover damages for consequential wrongs or torts, which, though they are *ex delicto*, are *quare ex contractu*; and they arise from malfeasance, or doing what the defendant ought not to do; or non-feasance, or not doing what he ought to do; and misfeasance, or doing improperly what he ought to do properly. . . .

In this case there was, I suppose, an express promise to perform a legal duty, and for the performance of that duty the parties were to receive a reward. They were under an obligation to the State of making the levy, appointing the collector, and taking a bond with approved security, and for these services they were to be paid. They failed to perform their duty, and a loss has ensued to the State, and it seems to me, they are not only liable to the State, by which they were employed in their official character, but that an action may be maintained either in *assumpsit* or in *case*. If this money cannot be recovered out of the defendants, from whom can it be recovered? It has been decided the State cannot recover it out of the collector. 4 H. & McH., 422, *State vs. Stewart*. Is the money then to be lost, when it was manifestly by the negligent conduct of the commissioners that the State cannot receive, or has not received it? There must be a remedy for a violation of a right or duty.

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*Alex. B. Hagner and Alex. Randall* for the appellees:

1st. The defendants are not individually liable in an action by the State for an alleged neglect of duty. The duty of the commissioners of the tax, in taking bond from the collectors, is not merely *ministerial*, but is one "in relation to which it is their duty to exercise judgment and discretion." In all such cases a public officer is not liable to an action, even though an individual may suffer by the mistake. 3 *How.*, 98, *Kendall vs. Stockton, et al.* 3 *Bouv. Inst.*, 181, and 2 *Do.*, 325, 502. 2 *Term Rep.*, 667, *Russell, et al., vs. Men of Devon.* 20 *Maine*, 246, *Reed vs. Belfast.* 9 *Mass.*, 247, *Mower vs. Leicester.* 17 *Conn.*, 478, *Chidsey vs. Canton.* 8 *Barb.*, 649, *Morey vs. Town of Newfane.* Such an action as this by the *State* against the officers of a county, to render them *individually* liable, is unprecedented. If there is any responsibility, it is by the *county* to the *State*, and not by these *individuals*. And if the *State* could sue the *county at all* in such a form of action, the suit should be against the *commissioners* in their official, corporate capacity. *Act of 1839, ch. 73.* 6 *Md. Rep.*, 468, *Commissioners of Washington Co. vs. Nesbitt.* 11 *G. & J.*, 50, *Barrickman vs. Commissioners of Harford Co.* 9 *Gill*, 382, *Commissioners of Female Seminary vs. State.* But no action lies against the *commissioners*, even in their official capacity. 11 *G. & J.*, 50. The board of *commissioners* is an inferior jurisdiction, and the way to render them responsible as such inferior jurisdiction, is by a *mandamus* to compel them to take the bond with sufficient security, or to proceed by *indictment*, as in the acts of 1843, ch. 307, sec. 6; 1845, ch. 203, secs. 1, 2; and 1845, ch. 254. 3 *Wat. Arch.*, 463. But the *State* reserved to itself a special remedy for a failure to pay the colonization tax by the counties. By the act of 1834, ch. 197, it directed the Treasurer to deduct from the school fund belonging to each county in default the amount so uncollected. Was not this intended as a relinquishment of any other remedy she might have had, and is it not ample? This court will presume this to have been done, as all public officers are presumed to have discharged their duty, and that

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the State has actually received from the school fund this tax. Of course *the State* has no cause to complain.

2nd. But even if the commissioners, *individually*, are liable in such a case, and if their duties were purely *ministerial*, still the judgment below was correct, because there was no averment in the declaration that the omission to take bond was *wilful*, or *malicious*, or *illegal*, or *corrupt*. 3 How., 87. 13 *Adol. & Ellis*, N. S. 245, *Linford vs. Fitzroy*. 2 *Nott & McCord*, 168, *Reid vs. Hood*. *Ibid.*, 172, *Young vs. Herbert*. 2 *McCord*, 107.

3rd. If the averment in the declaration is intended to assert that the commissioners took a bond, but that the security was insufficient, then no action can lie, for it was a mere matter of *discretion*; and if they honestly approved a bond which might have been good at the time, but *proved* insufficient, there can be no pretence that they are responsible, nor if the bond never was *sufficient*, if they honestly believed it sufficient. If the averment means that they *took no bond at all*, then there must be an averment of *corrupt* motive in neglecting to do so. They could not *compel* the collector to give bond. They are to *take* it when offered; but they could not *make* him *give* bond. The collector died, as the *nar* states. Suppose he died *just after his appointment*, are the commissioners to be held responsible for not performing an impossibility, in taking a bond from a dead man? It is impossible to tell from the *nar* how this breach of duty arose; whether the commissioners took *no bond at all*, or whether the bond they took, though sufficient at the time of taking, proved insufficient, or whether they relied upon the *general* bond of the collector, and did not think it necessary to take a *special* bond, as was the case in *State vs. Waters*, 1 *Gill*, 302. This case was not reported at the time of these transactions, and, until this decision, the *general* bond was thought to be sufficient. In either case the approval of the bond was a discretionary act—a *judicial* act by a special jurisdiction—and the failure to perform it is not the subject of such an action.

4th. The *nar* says the commissioners *made the levy*. When? If it was not made at the proper time, it was void. This

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should be alleged in the *nar* with certainty as to time and as to its legal effect.

5th. There is shown no legal authority for the institution of this suit, and some should be exhibited. The remedies on the part of the State, a *mandamus* and *indictment*, are to be found laid down, but none such as *this*. No individual, without express authority from the laws of the State, has any right to use the name and sovereignty of the State in suits in its own courts against its own citizens. Such a power as this will lead to mulcting the State in costs, as well as its citizens, without authority, and may be used oppressively to the rights of citizens. Who would accept these petty offices, or any public trusts, at such a hazard as to be personally responsible for all the acts of the entire corporate body? It may well be that these particular *individuals* may not have been, in point of fact, cognizant of the breach of duty alleged.

The authorities cited by the appellant only apply to actions by *individuals* against sheriffs and other *ministerial* officers. But no case can be found of an action *by the government* for damages against its own officers for alleged neglect of *judicial* duty. As well might the State sue the individual members of this court for damages on account of some decision deemed prejudicial to the State, or the Governor of the State, for not approving the bond of an inspector, or taking an insufficient bond.

**LE GRAND, C. J.,** delivered the opinion of this court.

We think the court properly sustained the demurrer to the declaration, and affirm their judgment. It does not clearly appear from the *nar* whether or not any bond was given by the collector. It is doubtful whether the allegation was intended to deny that any bond at all was given, or only that an *insufficient* one was given. Without going into an examination of the authorities bearing on the question presented by the demurrer, we consider it sufficient for the purposes of this case to refer to the decision at this term in the case of *Green vs. Purnell, Comptroller of the Treasury, (ante 329.)* The principle there decided covers this case. The duty imposed upon

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the commissioners, was one requiring of them "the exercise of judgment and discretion." It was judicial and not ministerial. A mere error in judgment does not give to the State a right of action. The *mar* does not contain any allegation that the commissioners acted corruptly.

*Judgment affirmed.*

(Decided July 22nd, 1858.)

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### THE AUGUSTA INSURANCE AND BANKING COMPANY OF GEORGIA, *vs.* EDWIN A. ABBOTT.

A policy of insurance is not a negotiable security, and the general clause, "*for whom it concerns,*" only avails for the person for whose benefit it was intended when obtained, by the party obtaining it, and whether it was so intended for one claiming the benefit of it, is a question of *fact* for the jury.

Where a policy provides that it shall be void, "*in case of its being assigned or transferred or pledged without the previous consent, in writing, of the insurers,*" an assignment without such consent confers no right upon the assignee.

So far as *good faith* in obtaining the insurance is concerned, a policy issued "*for whom it concerns,*" stands on the same ground as any other; for every such policy supposes an *agency*, and one who claims the benefit of it, is bound by the acts and representations of the parties or agents connected with the business of *procuring* it, although obtained without his knowledge.

If any *misrepresentation* or *concealment* of facts *material to the risk* be shown on the part of the agents or parties obtaining such a policy, it is void, no matter how innocent the party for whom it was intended may be, and no matter whether such misrepresentation or concealment be fraudulent, or the result of negligence or inadvertence on the part of such agents or parties.

The utmost good faith and fair dealing are of the very essence of the contract of insurance, and every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium, ought to be communicated to him.

A statement made to the insurers, that the vessel "is about ready to sail," or "she will sail soon," is not a promissory representation as to the time

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or sailing, which binds the assured and the breach of which will vitiate the policy.

In answer to the question, "what is the condition of the vessel as to seaworthiness?" a representation that she is a "*good old vessel*," imports no more than that she is *seaworthy*.

Where a representation is made merely *on information*, the assured is not answerable for the truth of the *facts* stated, but only for the truth with which he has *stated the information received*.

In a policy on a cargo of *lumber*, the implied warranty is, that the vessel is seaworthy to transport such a *cargo*, and a statement to the insurers, that on a previous voyage she had carried a cargo of *coal* without insurance, did not enlarge that warranty so as to require the insured to prove she was seaworthy to carry *coal*.

The difference between a *representation* and a *warranty* is, that while the latter must be *literally* fulfilled, it is sufficient if the former be *substantially* complied with.

Seaworthiness is an *implied warranty* in every contract of insurance, and the assured need not, in the first instance, disclose any fact however material to the risk, which tends to show the ship was unseaworthy when she sailed.

But when *inquiries* are made as to matters embraced in an *implied warranty*, such inquiries may render it necessary for the assured or his agent to disclose facts respecting which he might otherwise be silent.

An inquiry, "what is the condition of the vessel as to seaworthiness?" is general and indefinite, not pointing to any particular fact, and imports no more than an inquiry as to whether she was seaworthy.

Such an inquiry imposed no obligation upon the assured, to disclose facts tending to show the insufficiency of the vessel to carry a cargo of coal, or that she had been *discredited* by the marine insurance reports of the port where she was lying, or that ineffectual attempts had been made to get her insured there.

It is well settled that the assured is not bound to disclose the fact, that the risk has been declined by others or the estimate they put upon it, unless information on the subject be particularly called for.

Under a policy on a cargo of lumber "*at and from Baltimore to Boston*," the risk commences from the time the lumber is laden on board the vessel, and a *deviation* thereafter will avoid the policy, whether it occurs before or after the vessel actually leaves the port of departure.

A deviation avoids the policy because it *varies* the risk, and *delay in commencing* or prosecuting the voyage is as much a *deviation* as a divergence from its prescribed course, and will discharge the underwriters if *unreasonable* or *inexcusable*, and this rule applies as well to a policy on *cargo* as on the *vessel*.

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Not to deviate is as much an implied warranty in every insurance on a voyage, as the seaworthiness of the vessel, and each of these warranties is implied whether the policy be on the *ship* or on the *cargo*.

A delay, from the 19th of November to the 22nd of December, in *commencing* the voyage, is unreasonable, amounts to a deviation, and will discharge the policy on the cargo unless it proceeds from causes which justify or excuse it.

What the actual causes of delay are, is a question of *fact* for the jury; the legal sufficiency of such causes, to justify or excuse it must be decided by the court.

Delay resulting from the difficulty in obtaining a crew is excusable, but if occasioned by proceedings instituted in the Circuit Court of the United States, in admiralty, for the recovery of debts due for repairs to the vessel, by which she was seized, detained and sold, it is not excusable.

The underwriter does not run the risk of obstructions occasioned by the debts, insufficient acquittance, or neglect to pay debts of the assured, and this rule applies whether the policy be on the *vessel* or on the *cargo*; detention for such cause is not covered by the terms, "restraints and detainments of all kings, princes or people."

Where a delay in commencing the voyage is occasioned by debts of the vessel previously existing, and contracted without reference to the particular voyage, and the owner of the *cargo* insured is on the spot, the master cannot sell or hypothecate the *same* to pay such debts, except with the consent and authority of such owner, whom he must consult.

A prayer, after stating certain facts hypothetically as the basis of the legal propositions, contains the clause, "and if the jury shall find *all other facts assumed by this prayer*," HELD, that this clause is objectionable as tending to mislead the jury, and vitiates a prayer otherwise good.

The refusal of the court in a trial of a cause at *nisi prius*, to permit counsel to read to the jury the law from books, is a matter within the *discretion* of the court, and is not a subject of appeal.

### APPEAL from the Superior Court of Baltimore city.

*Assumpsit* brought on the 10th of December 1853, by the appellee against the appellant, on a policy of insurance underwritten by the defendants through its agents, Page and Banks, at Boston, on a cargo of lumber, to the amount of \$3500, per Brig Orb, at and from Baltimore to Boston. Plea *non assumpsit*.

The policy is dated the 28th of October 1852, and insures "Parker Fall for whom it concerns, \$3500 on lumber, viz., \$3200 under deck, and \$300 on deck, per Brig Orb, at and

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*from Baltimore to Boston," and by it the insurers "confessing themselves paid the consideration due unto them for this insurance by the insured, at and after the rate of one per cent and three per cent on deck," take upon themselves perils "of the seas, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes or people, of what nation or quality soever, *barratry of the master, (unless the insured be owner of the vessel,) and of mariners and all other losses and misfortunes, which have or shall come to the damage of the said property, or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston;" "and in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note if unpaid, and all sums due to the company from the insured, when such loss becomes due, being first deducted."**

It was also agreed, among other stipulations, "that in case of capture or *detention*, the insured shall not have the right to abandon therefor, until proof is exhibited of condemnation, or of the continuance of the detention (by capture or *other arrest,*) for, at least, *ninety days,*" and "that the insurers shall not be answerable for any charge, damage or loss, which may arise in consequence of seizure or *detention* for or on account of illicit or prohibited trade," and "that this policy shall be void in case of its being assigned, transferred or pledged, without the previous consent, in writing, of the insurers."

On the back of this policy was the following endorsement or assignment: "Baltimore, 18th November 1852. I hereby transfer all my right and interest in the within policy to E. A. Abbott, *for myself and other owners,*" (signed) "John H. Frisbie," in the hand-writing of one of the plaintiff's clerks, except the words "for myself and other owners," and the signature, which were in the hand-writing of Frisbie the *captain*, and, at that time, *part owner* of the vessel. One of the grounds upon which the action was resisted was, that this assignment was illegal, not having been made "with the previous consent in writing of the insurers," according to the condition of the policy.

The lumber was laded on board the Orb, by the 19th of

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November 1852, and she sailed on the 22nd of December following, was wrecked in Hampton Roads on the 3rd of January 1853, and by this disaster, loss and damage resulted to the cargo. The defences were, that the policy had been discharged, 1st, by that kind of *delay*, in the inception of the voyage, which amounted to *deviation* in construction of law; 2nd, because of misrepresentation as to the time of sailing; 3rd, because of misrepresentation and concealment of material facts as to the condition of the Orb, which, if they had been truly communicated to the defendant's agents, would have caused the risk to have been declined or the premium enhanced; and 4th, because the policy was not certainly intended to cover the cargo of the plaintiff, who had therefore, no such interest in the policy as to give him a right of action upon it. Evidence upon all these points was offered by both parties, and is sufficiently indicated in the instructions acted on by the court below, the arguments of counsel, and the opinion of this court. The letter of Frisbie to Fall, so frequently referred to, is as follows:

“BALTIMORE, October 20th, 1852.

MR. FALL:

Dear Sir:—I have taken up two or three times with lumber for Boston, and have to give it up on account of insurance, they cannot get her insured at no price, and I could not get the coal freight to Providence; there was one man said he would load her without insurance, and I waited for him two weeks, and was to commence this morning, and his partner came home and would not let him ship it. I should like for you to see Mr. Mayo, and see what can be done, I do not know of any thing but to go down the bay and buy a load of wood, there is a cargo of plank here already, if you can get it insured, telegraph to Wm. Rhodes as soon as you receive this, and I will have her loaded up and pay her expenses, which I cannot pay without. I have written two or three times before.

Respectfully Yours, JOHN H. FRISBIE.”

*1st Exception.* The plaintiff offered the following prayers:

1st. That the law presumes that the Orb was seaworthy, for the performance of the voyage from Baltimore to Boston,

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given in evidence in this case, until the contrary is proven, and that the burthen of proof of her unseaworthiness for the performance of said voyage, is upon the defendant.

2nd. If the jury believe from the evidence, that at the inception of the voyage mentioned in the evidence, the Orb was sufficiently tight, staunch and strong, for the performance of the voyage from Baltimore to Boston, with the cargo of lumber mentioned in the evidence, and that she was properly officered, manned and equipped for the performance of said voyage with said cargo, and that on said voyage, through storm and perils of the sea, the said cargo was lost in whole or in part, the plaintiff is entitled to recover in this case to the extent of such loss, although the jury shall believe from the evidence, that there was delay or negligence upon the part of the captain of said vessel in commencing said voyage.

The defendant then offered the following prayers:

1st. That the plaintiff cannot recover if the jury believe from the evidence, that when the Orb sailed from Baltimore in December 1852, she was not a sufficiently sound and staunch vessel for the voyage, at that season of the year from Baltimore to Boston, with the cargo insured, or if the jury find from the evidence that she was not supplied at that time, nor afterwards with such sails, chains and anchors, as were proper precautions for a vessel of her tonnage, in view of the ordinary and probable perils of said voyage.

2nd. That there was an implied warranty by the plaintiff, that the voyage should be made in the usual and direct course for seaworthy vessels, conveying from Baltimore to Boston such cargo as was the subject of insurance in the policy in suit, and any deviation can only be justified by necessity or lawful cause.

3rd. If the jury believe from the evidence, that the Orb was seaworthy for the purpose of lying in port, that her cargo was on board by the 19th of November 1852, that repairs and supplies had been ordered and contracted for by her master and owners, and had been done and furnished before the 20th of November 1852, that by reason of the refusal or inability of said master and owners, to pay for such supplies and repairs, the

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vessel was seized, detained and sold, under the libel and decree of the Circuit Court of the United States for the District of Maryland, given in evidence, so that she did not in fact sail from Baltimore, by some days, as soon as she would have done in case she had not been so seized and sold, then the plaintiff cannot recover, provided the jury find all the other facts assumed in this prayer, and that no effort to pay for said repairs and discharge said libels was made by the master, by sale or hypothecation of the cargo to a sufficient extent, and that no loss or damage occurred to the cargo insured before the 2nd of January 1853.

4th. If the jury believe from the evidence, that it would have varied the risk and premium, accordingly as the vessel sailed in November or December 1852, so that the risk would have been declined, or a higher premium charged, if it had been known to the defendant's agents at Boston that the Orb would not sail sooner than the 20th of December 1852, and that this was known at the time of the application for the policy sued on by both Parker Fall and defendant's said agents, and that with a view of deciding on this contingency, said agents did ask Fall, when he applied for said policy, when the Orb would sail from Baltimore, and that Fall then represented that she would sail soon, and that the cargo insured was in fact laden on the vessel by the 19th of November 1852, and that full, reasonable and sufficient time, to have been expected by the parties to the contract, for the commencement of the voyage had elapsed by the 25th of November 1852, then the plaintiff cannot recover, if the jury find that the Orb did not sail from Baltimore before the 20th of December 1852, from the causes given in evidence, provided they find that no loss or damage occurred to the cargo insured before the 2nd of January 1853, and also find all other facts assumed in this prayer.

5th. If the jury believe from the evidence, that Fall applied to defendant's agents at Boston, for the policy sued on by direction of John H. Frisbie, contained in the letter of said Frisbie, of the 20th of October 1852, given in evidence, and that at the time of such application, said agents enquired of Fall, where the Orb then was, and what was her condition as to

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seaworthiness? and that, in reply thereto, Fall represented that the Orb was in Baltimore, and was a good old vessel, and on the voyage before she brought a freight of coal from Philadelphia to Charlestown, and on that voyage her cargo was not insured, as the man whom she brought the cargo for never had his cargoes insured as said Fall understood, and that before said letter, of the 20th of October, was written, a cargo of coal which had been put by E. Pratt of Baltimore on board the Orb for conveyance to Providence, had, shortly before the said 20th of October, been necessarily discharged at Baltimore on account of the leaky condition of the vessel whilst said Frisbie was master and part owner of her, and that Frisbie was then advised not to take another cargo of coal, but to freight the Orb with a cargo of lumber, so that her seaworthiness would not be so severely tried, and that accordingly said Frisbie declined an offer from E. Pratt, before the said 20th of October, to freight the Orb again with coal, after the cargo of coal had been discharged as before stated, and if the jury further find, that a vessel must be more strong, staunch and seaworthy, to carry a cargo of coal by sea than a cargo of lumber, and that before the said letter of the 20th of October was written, Frisbie knew that the Orb had been characterised in October 1852, as an unseaworthy vessel, by the report of the inspector of ships for the insurance offices at the port of Baltimore, and that when, as before stated, Fall was enquired of as to the seaworthy condition of the Orb, none of the above facts nor the contents of said letter were communicated by him to the defendant's agents at Boston, except as hereinbefore expressly stated so to have been communicated, and if the jury believe that if the above facts, or most of them, or the contents of said letter had been then communicated to them, said agents would have declined the risk or enhanced the premium, then the plaintiff cannot recover, provided the jury believe the premium had never been paid to the defendant, and all other facts assumed in this prayer, and if they believe the premium has been paid, then the plaintiff is only entitled to recover that and its appropriate interest, in case no fraud was intended by the parties applying for the policy, by the representations made and failure to disclose their information.

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6th. If the jury believe from the evidence, that matters material to the risk as affecting the seaworthiness of the Orb, and which would have affected the premium or caused the insurance to be declined by the defendant's agents, when application was made for the policy in suit, were either known to Fall or Frisbie, so that they could with reasonable diligence have been communicated to said agents at that time by either of them, and if the jury believe that such facts were not, in fact, communicated to said agents then or before the loss proved in evidence, and that when said application was made, said agents enquired of Fall where the Orb then was, and what was her condition as to seaworthiness, then the plaintiff cannot recover, provided the jury believe the premium was never paid to defendant, and all the facts assumed in this prayer, and also believe that the application was made by reason of the said letter of the 20th of October, and in case they believe the premium has been paid, the plaintiff is only entitled to recover that with its proper interest in the absence of fraud.

7th. That the assured was under an implied warranty that the vessel should sail on her voyage with all safe, convenient and practicable expedition, and that if this was not done by reason of the acts of her master or owners, in not providing funds for repairs and supplies furnished said vessel, and if the jury find there was no effort made to obviate this delay, by sale or hypothecation of the cargo in whole or in part, by either master or owner of the Orb, then the plaintiff cannot recover, provided the jury believe that the loss occurred after said vessel sailed in fact, and that the premium was never paid to the defendant, and all other facts assumed in this prayer, and in case the jury believe the premium has been paid, then the plaintiff is not entitled to recover, if they find that the delay of the voyage occurred after the 19th of November 1852.

The court (*Frick, J.*) granted both the plaintiff's prayers, and also the first prayer of the defendant, but rejected all the defendant's other prayers, and the defendant excepted to the granting of the plaintiff's second prayer, and to the rejection of its prayers.

2nd. *Exception.* After the evidence had been closed on both

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sides, and the action of the court as stated in the preceding exception, the plaintiff's counsel opened the case to the jury, was followed by the junior counsel for the defendant, and the senior counsel for the defendant then addressed the jury till the adjournment of the court for the day, without concluding, and on the succeeding morning before continuing his argument, offered the defendant's eighth prayer as follows:

8th. If the jury believe from the evidence, that when Fall applied for the policy sued on, he was asked by the defendant's agent at Boston, to whom he applied as to the then condition of the Orb as to seaworthiness, and that Fall was then making said application by virtue of the instructions contained in the letter of Frisbie, given in evidence under date of the 20th of October 1852, and that said letter contained facts or implications connected with the condition of the Orb, at that time, as to seaworthiness, which were not communicated to the insurer's agents at Boston by Fall, and which would, if they had been communicated, have induced the underwriters either to decline the risk or to enhance the premium, and if the jury find that the premium has not yet been paid to the defendant, then the plaintiff cannot recover, though Fall had no fraudulent or deceptive motive in what he did or did not do, provided the jury find all the other facts assumed in this prayer, and if the jury find the premium has been paid, then the plaintiff is only entitled to recover that and its appropriate interest, in case they believe no fraud was intended in the failure to communicate the material information to the underwriter.

The counsel for the plaintiff then stated, they would expect to be heard on this prayer, if the court saw fit to entertain it at all; but the court rejected the prayer, as well because it was offered too late, under the rules of the court, as because it was not the law of the case. To this ruling the defendant excepted.

3rd. *Exception.* After the trial had progressed, as stated in the preceding exceptions, the senior counsel for the defendant, in the progress of his argument of the facts before the jury, proposed to read to the jury Chancellor Kent's opinion or doc-

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trine on a matter of law involved in the case, as expressed in better language than his own, which being objected to by the other side, the court refused to permit, under the invariable practice of that court since its institution, the law to be read from books, conceding and offering the right of the counsel to state the law to the jury, subject to an appeal to the court if dissented from by the other party. To this refusal and ruling the defendant excepted.

The verdict was in favor of the plaintiff for \$3374.56, damages, with interest and costs, and from the judgment thereon rendered the defendant appealed.

The cause was argued before ECCLESTON, TUCK and BARTOL, J.

*A. S. Ridgely and Wm. H. Norris* for the appellant:

1st. The policy was discharged and the underwriters absolved from liability by the unjustifiable delay in commencing the voyage. This delay amounted to a *deviation*, and the insured *on cargo* is in no different right in this particular than the policy holder *on a vessel*. This is *irrespective* of any *representation* as to the time of the vessel's sailing. A stipulation against deviation—and delay from *unjustifiable cause* is deviation—is an *implied warranty* in *every* policy of marine insurance. "In short, whenever the delay exceeds a reasonable time, or is incurred for purposes unconnected with the true object of the voyage insured, it will amount to a deviation." (1 Arnould on Ins., 42, 341, 342, 383, 387, 390, 400. 1 Phillips on Ins., secs. 690, 692, 981, 983, 984, 988, 989, 995, 996, 998, 1002, 1020, 1021, 1031, 1050. 9 Mass., 448, 449, Coffin vs. Newburyport Marine Ins. Co. There is no distinction between a policy holder *on goods* and on the *vessel*, each is responsible for the master and for *deviations*. 2 Smedes & Marshall, 375, Natchez Ins. Co., vs. Stanton, et al. Weskitt on Ins., 169, 179. 7 H. & J., 291, Riggan vs. Patapsco Ins. Co. 8 Mass., 321, 322, Cleveland et al., vs. Union Ins. Co. 24 Eng. Law & Eq., Rep., 36, Gibson vs. Small, and same case in 71 Eng. C. L. Rep., 157. Park on Ins., 294,

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295. The reason of thus holding the insured *on cargo* responsible for a deviation is, that a stipulation against deviation is an *implied warranty* in the *policy*. It is admitted by the counsel for the appellee, that a deviation in *the course of the voyage* would vitiate a policy on goods. Why so? The *owner of the cargo* has no more control over the action of the master as to the prosecution of the voyage, than he has as to its *commencement*. It is therefore only and solely because of this implied warranty, that the insured *on cargo* is responsible for a deviation in the course of the voyage. And this same warranty, according to all the authorities, applies as well to a deviation occasioned by an *unjustifiable delay in the commencement* of the voyage, as to an actual turning from the usual route in the progress of the voyage. In addition to the cases before cited, reference is made to the following authorities, all of which were cases of policies on goods, and the distinction here attempted to be drawn was not even alluded to. 14 Eng. C. L. Rep., 4, *Hare vs. Travis*. 7 Term Rep., 505, *Phyn vs. Royal Exchange Ins. Co.* 4 Eng. C. L. Rep., 246, 248, *Roscow vs. Corson*. 55 Eng. C. L. Rep., 781, *Oliverson vs. Brightman*. 2 Wash. C. C. Rep., 7, *Winthrop vs. Union Ins Co.* 3 Wash. C. C. Rep., 168, *Poppleston vs. Kitchen*. 3 Mass., 331, *Taylor vs. Lowell*. Ibid., 409, *Stocker vs. Harris*. 3 Pick., 172, *Hale vs. Mercantile Marine Ins. Co.* 11 Johns., 352, *Graham vs. Commercial Ins. Co.* 23 Missouri, 553, *Salisbury vs. Marine Ins. Co.* The ship owner is answerable to the freighter or charterer for the acts of the captain. *Abbott on Shipping*, 344, 362. 8 Pick., 159, *Hobart vs. Norton*. 5 Ohio, 436, *Lodwick vs. Ohio Ins. Co.* The delay of the vessel in this case, in port, by the libels from the District Court, for supplies furnished anterior to the 20th of November 1852, is a clear deviation, for which the shipper of goods is answerable by the discharge of his policy, and his remedy is against the owners or master, for not having liquidated these bills and enabled the vessel to sail. It was competent for the master to have sold or hypothecated the cargo to enable his ship to sail. *Abbott*, 372, note 2. 9 Johns., 30, *Faintaine vs. Col-*

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*umbian Ins. Co.* 3 Story's Rep., 491, 492, *Pope vs. Nickerson.* 3 Mason. 260, *Ship Packet.* The shipper could have unladen his cargo and sued the owners for expenses and damages, if the vessel was detained by the neglect or inability of the captain to pay for these supplies and repairs, (*Abbott*, 412, notes,) though it is not contended, that the liability of the ship-owner for a loss on the cargo, by the fault of the master and crew, necessarily exonerates the underwriters. 1 *Phillips*, sec. 1052.

It is supposed by the counsel for the appellee, that whatever might have been the law in earlier days, that a different rule has been recently established in this State, by the case of *Georgia Ins. & Trust Co., vs. Dawson*, 2 Gill, 369, 370. But that case merely established, that the negligence of the master as to the stowage of cargo, was neither covered by implied warranty nor by any express one in the policy in suit. Mr. Phillips cites the case without any suspicion that it was introductory of any change in the *law of deviation*. 1 *Phillips*, 592. The fact is, there are certain implied warranties, which if fulfilled at the commencement of the risk, make the negligence of the master and crew thereafter chargeable to the insurer, if loss occurs from any of the enumerated perils, and this Maryland case is an instance. But there are other implied warranties which remain in obligation to the end of the voyage, and any breach of them by the master or mariners is at the risk of the insured. Such is the implied warranty as to deviation. After stating the law as to the first class, and the doctrine of *proxima causa*, Mr. Phillips, (sec. 1050,) says: "This doctrine is limited to the acts and neglect of the master and crew, as such, in conducting the voyage or in charge of the subject. It intercepts and prevents a forfeiture of the insurance by reason of unseaworthiness, resulting from or continuing by reason of carelessness or mistake of the master or crew, but it does not prevent a forfeiture by deviation, which is in effect a violation of an express stipulation of the policy, imported by the mere description of the voyage;" Nor is the law of deviation simply applied to the commencement and course of the voyage. A tardy landing of goods at the port of

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destination, is a deviation which discharges the underwriter. 1 *Phillips*, sec. 998. Nor is the law silent as to the specific cause of deviation in this case. "The doctrine is laid down in *La Grideon de la Mer*, that the underwriter does not run the risk of obstructions occasioned by the *debts*, insufficient acquittance or neglect to pay debts of the assured. The underwriters were held, in New York, not to be liable for the aggravation of a loss, by reason of the assured's not providing for supplying means to the master of an American vessel, to raise funds to repair at the island of St. Thomas in the West Indies." 1 *Phillips*, sec. 1046. 20 *Wend.*, 287, *American Ins. Co., vs. Ogden*. 1 *Camp.*, 265, *Jarratt vs. Ward*. What facts constitute a deviation, is a question of law for the court, and "the court and not the jury are the judges whether the deviation be justifiable." 7 *H. & J.*, 291. 2 *Phillips*, 585. 2 *Smedes & Mar.*, 375.

2nd. The policy was discharged or rendered void, by the misrepresentation or concealment of material facts connected with the condition of the vessel. As to this part of the case, it is contended by the counsel for the appellee, that being insured on cargo, and as the policy was "for whom it concerns," he cannot be affected by the acts or misrepresentation and concealment of the captain acting for the owners of the vessel, or of his agent Parker Fall. This presents, first, the inquiry, whether a policy "for whom it concerns" can possibly be used by any one, free of responsibility for the acts and omissions of those who in fact obtained it? They certainly act as *agents* "for whom it concerns," either originally or by adoption. 7 *H. & J.*, 450, *Newson vs. Douglass*. The subsequent adoption of this policy cannot exempt it from the law of concealment, and of fraud or misrepresentation in its procurement; for all such policies presuppose *an agency*, and that the parties obtaining them are the *agents* of those who adopt and use them. The proof shows who ordered the policy, and who applied for it. Abbott is, therefore, answerable for Frisbie and Fall and each of them. That the verdict found the vessel seaworthy, does not dispense with the doctrine of misrepresentation and concealment in relation to her seaworthiness; for

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there are grades and degrees of this, which affect the risk and vary the premium, or cause an insurance to be declined. The first step is to ascertain the general principle which is to be the law of duty to agents applying for insurance. It is the familiar one of *uberrima fides*. 2 *G. & J.*, 162, *Allegre vs. Maryland Ins. Co.* We are next to see the principles of construction, which are to expound any representation made, premising that "the object of the assured in making a representation usually is to reduce the premium by showing the real to be less than the apparent risk." 2 *Duer on Ins.*, 656. 1 *Arnould*, 489, 492. "A representation imports not only what is expressed, but also all the natural and obvious inferences from it." 1 *Phillips*, secs. 567, 550. The "insured is required, as a preliminary step, to communicate to the underwriter all other" (excepting those the underwriter is bound to know) "material facts within his knowledge, or presumed to be so, or of which he is bound to be informed, that would directly tend to induce the underwriter not to subscribe the policy at all or to demand a higher premium." 1 *Phillips*, sec. 571. There is an additional principle which affects and controls the preceding one, as to representation and concealment; "matters of implied agreement in the policy need not be represented by the assured in the first instance, but he is bound to make true answers to inquiries by the underwriter, relating to matters of implied warranty. And though no such inquiries are made, still, if the assured voluntarily make representations of this description, he will be bound thereby, and the policy will be void unless they are substantially true." 1 *Phillips*, sec. 601. 1 *Arnould*, 515, 517, 518. 2 *Duer*, 572 to 581. The duty of the assured to answer truly questions, as to matters covered by implied warranties, shows that there are grades of differences in those matters, which may affect the underwriter's judgment as to taking the risk at all, or the premium at which it will be taken. In other words, that the underwriter wishes to know more than the mere implied warranty of itself communicates. 1 *Phillips*, sec. 586. 8 *Pet.*, 581, *Hazard vs. New England Marine Ins. Co.* The moment, therefore, that the underwriter inquires as to such matters, the whole law of con-

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cealment and representation is brought to bear on the assured. As to the points enquired of, the assured is in the predicament as to disclosure and truthfulness, which the law imposes on him as to other matters which he is bound to communicate and represent truly to the underwriter in the first instance. 1 *Phillips*, sec. 601. 4 *East.*, 590, *Haywood vs. Rodgers*. Now, if seaworthiness were not a matter of implied warranty, what would the assured in this case have been bound to apprise the underwriters of, under the rule requiring him to inform them "of all material facts within his knowledge, or presumed to be so, or of which he is bound to be informed, that would directly tend to induce the underwriters not to subscribe the policy at all, or to demand a higher premium?" If the inquiry had been made as to her then condition of seaworthiness, would not the owner of the vessel in the case of *Haywood vs. Rodgers*, have been bound to communicate the letter, which stated that "the ship was in very good order, but that he had a survey on her *on account of her bad condition?*" "A question of seaworthiness is determined by the usages of the port where the vessel is fitted out, in reference to the destined voyage." 8 *Pet.*, 581. Seaworthiness is variable, and relates to the voyage and cargo to be transported. 1 *Phillips*, sec. 720, note 3. The implied warranty only relates to seaworthiness, for the voyage proposed with the cargo proposed. The proof shows, that a vessel may be seaworthy to carry lumber and not so to carry coal. The verdict has only found, that the vessel was seaworthy to transport lumber from Baltimore to Boston. But that was not the inquiry put to Parker Fall, nor was that the representation he made. The insurer had the right to make the inquiry as to the *general* seaworthiness of the vessel, and it was the duty of Frisbie to have provided his agent with the means of fully answering the question, and more especially the duty of Fall to have supplied the insurers with all the information that had been communicated to him by Frisbie's letter of the 20th of October 1853. This was required by the law of concealment *after the inquiry had been made*. 2 *Paine's C. C. Rep.*, 84 to 90, *Buckly vs. Providence Ins. Co.* The fallacy is in supposing, that, as the

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verdict has found seaworthiness for the particular voyage with the particular cargo, nothing has been concealed and nothing misrepresented. But as it often happens that the representation of the assured, or information of the insurer, reduces the implied warranty in favor of the assured, (*1 Phillips*, sec. 602; *2 Duer*, 671,) so, on the other hand, *when inquiry is made* that may call for disclosure of facts beyond those covered by the implied warranty, the representations made may avoid the policy by their untruthful or deceptive character, *even though the implied warranty is complied with*. *2 Duer*, 670, 671. *1 Phillips*, sec. 586. In *Hazard vs. New England Marine Ins. Co.*, 8 Pet., 581, the court says: "A question of seaworthiness is determined by the usages of the port where the vessel is fitted out, in reference to the destined voyage. But the facts stated in a representation, may go beyond those usages; and the insured is bound to the extent of his communication, whether verbal or written. In the one case the law implies a definite and fixed responsibility; in the other the liability depends on the express declaration of the insured." Whilst, therefore, the insurance was on a lumber cargo, the general inquiry as to her then condition of seaworthiness, called for the communication of the facts, that the marine report at Baltimore had discredited the "*Orb*" as unseaworthy, that she had proved incapable of conveying coal, that her captain had declined a cargo of coal offered by Pratt, and that the letter of the 20th of October also indicated to Fall that she was not deemed fit to transport that kind of tonnage. Yet, in the face of these facts, known either to the captain who ordered the insurance or to his agent who applied for it, the representation was made that she was a "*good old vessel*," and had "*carried coal* on her last trip from Philadelphia to Charleston, for a man who was *not accustomed to insure his cargoes*". *2 Duer*, 442, 443. Whether this concealment or misrepresentation was fraudulent or innocent is *wholly indifferent*, provided it has reference to *material facts*. *2 Duer*, 411, 412, 420 to 422. *20 Eng. Law & Eq. Rep.*, 341, *Anderson vs. Thornton*. *1 Arnould*, 536, 537. *20 Maine*, 130, *Dennison vs. Marine Ins. Co.* And the information must be all

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that the latest reasonable diligence could have communicated to the underwriters. 11 *G. & J.*, 250, *Neptune Ins. Co. vs. Robinson*. 1 *Pet.*, 170, *M' Lanahan vs. Universal Ins. Co.*

3rd. Abbott had no interest in the policy, and it was not *certainly obtained* for him but for any one who might freight the vessel; the clause, "for whom it concerns," does not in such case dispense with the necessity of an assignment under the conditions of the policy. These words do not make the policy a *negotiable instrument*; they are only meant to conceal an *existing fact*, and are not so elastic as to cover *any one* who may come in afterwards. The party who seeks to obtain the benefit of such a policy, must have been in the contemplation of the party procuring the insurance, at the time it was procured. 7 *H. & J.*, 450, 451, *Newson vs. Douglass*. 1 *Phillips*, 214. All the proof shows that this policy was not *certainly intended* for Abbott; the *assignment* of the policy to him especially confirms this. At all events, it was, upon the evidence, a question for the jury that the policy was merely got in the hope and expectation that Abbott would ship, and that failing, to induce somebody to freight the vessel; and if they so found, this could not, upon the authorities just cited, be considered an insurable interest in Abbott at the time of the policy.

4th. The eighth prayer of the defendant was seasonably presented. Though the law of it is raised by the plaintiff's second prayer, yet it was competent for the defendant, more specifically to raise the point as to the immateriality of Fall's want of fraudulent and deceptive motive.

5th. The defendant's counsel was entitled to read to the jury the language of Chancellor Kent, subject to the right of objection on the other side, as to its applicability or correctness. 6 *Porter*, (*Indiana*,) 40, *Selby vs. Wilcox*.

*St. Geo. W. Teackle and George M. Gill* for the appellee:

The proof shows, that Frisbie was to get an insurance to cover the cargo to be put on board by the plaintiff, and the plaintiff was, at the time, in the contemplation of the party procuring the insurance, and the party for whose benefit it was

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intended. It is immaterial whether Fall then knew for whose benefit it was intended, as he acted under the authority of Frisbie and as his sub-agent, and in this respect this case is similar to that of *Newson vs. Douglass*, 7 H. & J., 452. Hence, the plaintiff by his subsequent adoption of this policy, had a right to avail himself of it, and such adoption is deemed equivalent to his prior order for insurance.

A difference exists between such a case as this, and the case where the party desiring insurance applies by himself or his agent for insurance. An insurance company is bound to be doubly careful when it issues a policy "for whom it concerns." It cannot know for whose benefit it will ensure, or who will claim under it or what use will be made of it. 5 Cranch, 100, *Hodgson vs. Marine Ins. Co. of Alexandria*. It must have been issued in this case to give credit to the Orb, and to enable those interested to obtain a freight for her. Here an innocent party who made no representations, who authorised none to be made for him, and who has selected a vessel seaworthy and fitted for the destined voyage with the destined cargo, is sought to be affected by what is alleged to be a concealment of what are said to be material facts, made before he had adopted the insurance, and under circumstances with which it was almost impossible for him to be acquainted, and which, if in point of fact they existed, were unknown to the plaintiff when he adopted the policy. To make him responsible under these circumstances, would be to visit him with the punishment of a wrong-doer, and to enable a party who has caused a wrong to be done him to escape. The insurance company which issues a policy such as this, cannot escape upon a ground of this kind, without bringing home to the plaintiff some participation in the wrong complained of. By issuing this kind of policy a limited negotiability, at least, is given to it, for whosoever was in the contemplation of the party obtaining it, may, although he knew nothing of what had been done, when it was done, by subsequent ratification without limit as to time, or, at least, until the actual satisfaction of the policy, claim the benefit of it. 2 Maule & Selv., 385, *Hagedorn vs. Oliverson*. It is therefore insisted for the appellee:

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1st. That under the circumstances of this case, the plaintiff, for whose benefit the policy was issued, was only bound to see that the vessel on board of which his cargo was put, was seaworthy, well fitted, manned and equipped, at the inception of the voyage; and that he is not responsible for the acts of the master and mariners of the vessel, in respect to the mode of conducting the voyage. In support of this view, see 2 *Gill*, 370, *Georgia Ins. & Trust Co. vs. Dawson*; 5 *Mees. & Wels.*, 415, *Dixon vs. Sadler*, and same case in 8 *Mees. & Wels.*, 896; 11 *Pet.*, 224, *Waters vs. Merchants Louisville Ins. Co.*; 1 *Kernan*, 9, *Mathews vs. Howard Ins. Co.*

2nd. In Maryland, "underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the masters and mariners," (2 *Gill*, 370,) and this rule applies to all cases involving the negligence of the master and crew, such as taking in sail, steering the course, trimming the ship, selecting the route, in *stopping in port*, in *hastening* or *retarding* the *operations* of the *voyage*; for all these might be remotely connected with the loss. This rule might not apply to a deviation in its broad sense, or a breaking up of the voyage, upon the ground that there is an implied warranty in the policy, that the voyage between the points designated is to be performed; but this implied warranty does not require this to be done with the utmost speed practicable. But this rule does and must apply to a *delay in commencing* the voyage, arising from the negligence or default of the master where the *cargo* is insured, and belongs to a party *not the owner of the vessel*, and when the *owner of the cargo* has used due diligence in shipping it. This is now the received law of this country and of England. See 10 *East*, 415, *Bowden vs. Vaughan*, and 2 *G. & J.*, 160, *Allegre vs. Maryland Ins. Co.*, where the distinction is drawn between the case where the assured owns both *vessel* and *cargo*, and where he owns *only cargo*. No such laches on the part of the master can affect the holder of a *policy on cargo*. The case in 2 *Smedes & Mar.*, 340, is not against us in view of the facts of the present case, and if it is, it is not the law of Maryland, for it is in *direct conflict*.

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with *Dawson's Case*, in 2 *Gill*, 370, and cannot be regarded as authority by this court.

3rd. There was no stipulation on the part of the assured, that the vessel was to sail by any particular day. The insurers might have inserted such a provision in the policy, or have advised the assured in time before the sailing of the vessel, that they relied upon Fall's statement, that she was "about ready to sail" or "would sail soon," as a representation, neither of which was done, and no advantage can now be taken of this defence. 1 *Camp.*, 119, *Beckwith vs. Sydebotham*. 2 *G. & J.*, 160. 10 *East.*, 415.

4th. But if there was any delay or detention it was *excusable*. It was caused by the proceedings of a court of competent jurisdiction, and without fault or omission by the assured, the owner of the cargo. The insurers take upon themselves by this policy, perils "from restraints and *detainments* of all kings, princes or people, and *barratry* of the master, (unless the insured be the owner of the vessel,) and of mariners." The detention here, arose from liabilities of the vessel to material men. The owner of the cargo was under no obligation to pay these liabilities. It was the duty of the owner and master to pay them. Can their failure affect the assured the owner of the cargo? In this policy the distinction is made between the owner of the vessel and cargo in respect to barratry of the master, and this distinction prevails throughout. In the case of the *Patapsco Ins. Co. vs. Coulter*, 3 *Pet.*, 236, it was decided, that where the policy covers the risk of barratry and fire be the proximate cause, the courts will not sustain the defence, that negligence was the remote cause. The law cited on the other side, applies only to voluntary deviations. Here, for part of the time it was impossible to get a crew, and for the rest of the time the libels detained the vessel. The inability to obtain a crew is by all the authorities sufficient to excuse a delay; for a crew to navigate the vessel is just as necessary to her seaworthiness as the planks on her bottom. Before this difficulty was removed, she was detained by the libels under which the marshal had power to seize and detain her. But it is said the plaintiff ought to have paid these

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claims. This we deny. The plaintiff was a mere *freighter* not chartering the vessel and was not bound to pay these port charges. Where a voyage is once *commenced* the master may sell or *hypothecate* the cargo, in order to *complete* the voyage, but this law has no application to the case of a ship lying in port before the voyage is commenced; it applies to the case of *completing a voyage begun*, not to charges incurred before that time.

5th. The evidence in the case, shows that the detention did not increase the risk and was *immaterial*. The first libel was filed on the 30th of November, at which time the vessel was not ready to sail, and she could not have sailed until December, even if not detained by the libels. The proof shows, that December was more dangerous than November, but this proof applies to the entire month of December. 2 G. & J., 160.

6th. The insurance in this case being "for whom it concerns," and being intended to induce the plaintiff to ship a cargo by the Orb, and having been obtained without any previous authority to do so from the plaintiff, he is not bound by any acts, representations or concealments, if any, on the part of the captain or Fall, and is not responsible therefor to any extent whatever. His subsequent ratification of the policy does not make him responsible for their conduct in effecting it, unless he was in some way apprised or informed of such conduct. In this respect, it differs from an ordinary insurance, which could be effected only by the party insured, or some one acting in his behalf, or by his authority previously given. The defendant, by issuing a policy in this form, has induced an innocent third party without knowledge or notice of the conduct or acts complained of, to accept the insurance and ship his cargo upon the faith of it. 1 Term Rep., 12, *Fitzherbert vs. Mather*. 4 Mason, 74, *Ruggles vs. General Interest Co.* 12 Wheat., 414, *General Interest Co. vs. Ruggles*. 5 Cranch, 100, *Hodgson vs. Marine Ins. Co.*

7th. There is no evidence that there was any concealment or misrepresentation on the part of Frisbie or Fall, and none is pretended on the part of the plaintiff. Banks says, that Fall represented that the vessel was then at Baltimore, that

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she was about ready to sail from there bound to Boston. Fall states, he represented that the brig Orb was then at Baltimore, and that she would sail therefrom soon, on the voyage insured, but no particular time was stated when she would sail. On this point see 1 *Camp.*, 119; 2 *G. & J.*, 159. Again, Fall made a representation as to the seaworthy condition of the vessel, and being asked what was the condition of the vessel, he represented that she was a good old vessel. When this representation was made, the agent referred to the Boston marine inspector's report, which showed the age of the vessel and her rate as B. 1. Fall also represented, that on the voyage before she brought a freight of *coal* from Philadelphia to Charleston, and that the cargo was not insured, that the man whom she brought the coal for never had his cargoes insured *as he understood*. Fall says he made no untrue statement, and none which was designed to deceive or mislead the underwriters; that he had no interest and no object except to accommodate Frisbie and assist him in getting business. There was no misrepresentation, either as respects the time of sailing nor as to the actual condition of the vessel. The jury have found that the vessel at the commencement of the voyage was seaworthy, that she was sufficiently tight, staunch and strong, for the voyage insured with the cargo insured, and that she was properly officered, manned and equipped therefor, and they have therefore found the truth of every representation made as to the condition of the vessel, and there is no proof that any statement was made which was *not true*. Was there any *concealment* as respects Fall? It is contended, that he ought to have shown the letter from Frisbie to him, of the 20th of October. This letter showed nothing beyond the fact, that Frisbie could not get *insurance in Baltimore*, and desired Fall to get it in Boston. Now it is well settled law, that the assured is not bound to state to the underwriters, that he has applied to others who refused to insure. 4 *Mason*, 83, *Ruggles vs. General Interest Co.* Fall states that he had no conversation and no communication with Frisbie, in relation to any prior application for insurance, and that he was not able to state in what condition of repair the vessel was in when at

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Baltimore in the fall of 1852, or whether she was seaworthy, but from what he had heard of her, he should say she was fit to carry a cargo of lumber from Baltimore to Boston, at that time. So far then as respects Fall, there was no concealment; he replied fully, frankly and truthfully, to the question put to him. He was not asked as to whether there had been any previous application to insure, and was not bound to refer to this as no such matter was inquired about. As respects Frisbie, it is proved by the two witnesses at Boston, that he was not present when these representations were made, and his own testimony, although differing as to the fact of his being present at some time, yet it confirms what the others say so far as these representations were made, and that if made at all, they were not made in his hearing. But it is said Frisbie knew all the circumstances which had taken place at Baltimore, and was bound to communicate them to his agent Fall, so that the latter might have made them known at the time he applied for insurance. On this subject, the case of *Haywood vs. Rodgers*, 4 *East.*, 590, is directly in point. In that case the principle is laid down, "as an assured impliedly warrants the ship insured to be seaworthy, what forms an ingredient in seaworthiness is not necessary to be disclosed by the assured in the first instance, unless information on the subject be particularly called for, and then the assured must disclose truly what he knows in the respect required." See also 3 *Kent*, 286. The only inquiry here made was *general* in its character, no<sup>t</sup> particulars are specified. Again, a party making a concealment or misrepresentation, must know that what he states is *false*. When Fall said she was a *good old vessel*, he said what he believed was true and what the jury have found to be true. To constitute concealment *facts* must be kept back not *opinions*. There is no evidence that the plaintiff or Frisbie, knew that the Baltimore Marine Insurance Reports had discredited the vessel by rating her B. But suppose they did, the defendant's agents took the risk upon the Boston report, not on what Fall told him.

8th. All the prayers of the defendant, except the first and second are fatally defective in form, and for this reason ought

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not to have been granted. They all contain this clause, "and if the jury shall find all the *other facts assumed in this prayer.*" This is a fatal defect, for if any facts are assumed the prayer is bad, and if there are none assumed the clause tends to mislead the jury.

9th. The ruling of the court in the second exception was correct, for under the rules and practice of that court, the counsel had no right to offer the prayer at that stage of the case. Besides, the law of it was erroneous, if the positions we have already argued are sound.

10th. The court below was right in refusing to permit counsel in the argument of facts before the jury, to read the opinion of judges from *law books*, on a point of law which the court had decided by its action on the prayers presented in the case. If this were permitted, there would be no means of reviewing in the court above the legal propositions insisted on, and the right of appeal would thus be virtually destroyed.

BARTOL, J., delivered the opinion of this court.

This action was instituted by the appellee, on a policy of insurance made by the appellant, upon a cargo of lumber per brig Orb, at and from Baltimore to Boston. The policy was issued in the name of "*Parker Fall, for whom it concerns;*" and the first question presented for our consideration is, whether the appellee has such an interest in the policy as to give him a right of action upon it? The evidence shows that the brig was lying at the port of Baltimore, and that Frisbie, the captain and part owner, employed Parker Fall, as his agent at Boston, to obtain insurance on a cargo of lumber, in order to enable him to procure freight for the vessel; that the appellee had told Frisbie he would freight the brig with lumber if an insurance could be obtained upon it, but did not expressly authorize either Frisbie or Fall to obtain the policy in question, nor had he any knowledge of it until after it was issued, when he adopted it, and, upon the faith of it, placed his cargo on board.

The assignment of the policy by Frisbie to Abbott, made on the 18th day of November 1852, not being made "*with the*

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*previous consent in writing of the insurers,"* as required by its terms, conferred no right upon the assignee, and his interest in the contract must be determined as if that assignment had not been made.

The law is well settled, that a policy of insurance is not a negotiable security. The Court of Appeals have said, that "A policy in the name of one, with the general clause *for whom it may concern*, will cover and protect the interest of any person for whose benefit it was intended, and who authorized it to be effected; and if, in the absence of any express order or authority from the owner, or any previous communication with him on the subject, such policy is effected in his behalf, the intention at the time of the party effecting it to cover his particular interest, will so connect him with the policy as that his adoption of it afterwards, will cause it to inure to his benefit. The subsequent adoption of a policy by a party interested, and for whose benefit it was intended, being deemed equivalent to his prior order for insurance. But no one can, by subsequent adoption, avail himself of such a policy who was not at the time in the contemplation of the party procuring the insurance, and for whose benefit it was not intended, notwithstanding any interest he may have in the thing insured."

*Newson's Admr. vs. Douglass*, 7 H. & J., 451, 452.

In this case it is contended, on the part of the appellant, that the policy on which the action was brought, was not intended to cover the particular cargo of Abbott; but that it was procured at the instance of Captain Frisbie, for the purpose of enabling him to obtain freight, and was designed to cover any cargo of lumber which he might obtain for the vessel, no matter from whom. If that be so, then upon the authority cited, the appellee cannot maintain his action upon it.

But it is properly a question for the jury to determine, from the evidence, whether the policy in question was or was not designed, *when obtained*, to cover the particular cargo of the appellee, and the Superior Court erred in taking that question from the jury. The second prayer of the plaintiff, which was granted by the court, treated the policy as if it had been issued to Abbott himself, or in his own name.

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The next question presented by the record, is whether, in obtaining the policy, there was misrepresentation or concealment of material facts connected with the condition of the vessel? This depends upon the particular facts and circumstances which attended the obtaining of the policy; but before proceeding to an examination of them, it is proper to say that we do not concur in the view taken by the appellee's counsel in the argument, "that a difference exists between such a case as this and the case where a party desiring insurance applies for it by himself or his agent." So far as the question of good faith in obtaining the insurance is concerned, the case where the policy is issued "*for whom it may concern,*" stands upon the same ground as if the name of the assured were inserted. "Every such policy supposes an agency;" (*7 H. & J.*, 450;) no one can avail himself of it, but he for whom it is intended, and although obtained without his knowledge, and without any previous authority to the agent, its adoption by him afterwards, binds him to the acts and representations of the parties or agents connected with the business of procuring it, to the same extent as if they had acted under his authority previously given. See *Park on Insurance*, 208.

In this case, therefore, the appellee is responsible for the acts of both Frisbie and Fall, in their dealings with the company, and if any misrepresentation or concealment of facts material to the risk, be shown on the part of either of them, the policy would be void, no matter how innocent the appellee might be in the transaction; and no matter whether such misrepresentation or concealment be fraudulent, or result from negligence or inadvertence on the part of the agents connected with the business of procuring the insurance. *12 Wheaton*, 412. *4 Mason's Rep.*, 74. *1 Term*, 12. *3 Kent*, 286.

This results from the nature of the contract: "The utmost good faith and fair dealing are of its very essence, and every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, ought to be communicated to him." *2 G. & J.*, 162.

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In this case, the representations of Parker Fall to the agent of the appellant, were made in answer to the question, "*Where is the Orb, and what is her condition as to seaworthiness?*" The reply was, "*She is at Baltimore, about ready to sail, (or she will sail soon.) She is a good old vessel; on the voyage before, she brought a freight of coal from Philadelphia to Charlestown, and the cargo was not insured; that the man for whom she brought the coal, never had his cargoes insured, as I understood.*"

The policy was dated the 28th day of October 1852; the vessel did not sail till the 22nd day of December 1852.

The objection of the appellant, that the statement made as to the time of sailing, was a promissory representation which bound the assured, and that the breach of it vitiates the policy, is conclusively answered by the decision of the Court of Appeals, in the case of *Allegre's Admr. vs. The Maryland Ins. Co.*, 2 G. & J., 159, and was abandoned by the counsel in the argument. The time of sailing is not, therefore, material in the consideration of this branch of the case. As to the statement that she was "*a good old vessel,*" according to our construction of those words, they import no more than that she was seaworthy, a fact the truth of which it was proper to submit to the jury upon all the evidence; but that is embraced in the implied warranty, and does not stand upon representation, which is always matter outside of the policy.

It has been argued that the statement made by Fall, "that the Orb had carried a cargo of coal on her previous voyage from Philadelphia to Charlestown for a man who did not insure," &c., was equivalent to a representation that she was then capable of transporting such a cargo, and that there was evidence tending to show the same was not true. In support of this construction the counsel cited 1 *Phillips on Insurance*, sec. 567, where the principle is stated, "that a representation imports not only what is expressed, but also all the natural and obvious inferences from it." Without impugning the principle, it is sufficient to say, we do not consider that it sustains the view contended for here. It is not pretended the particular fact stated was untrue; besides, the statement was

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made merely on information, and in such case the assured "is not answerable for the truth of the facts stated, but only for the truth with which he has stated the information received." *1 Arnould, sec. 193.*

Nor did that statement, in our opinion, operate to change the contract. The policy issued was on a cargo of lumber; the implied warranty was that the Orb was seaworthy for the transportation of such a cargo, and the statement made to the agent of the underwriter did not enlarge that warranty so as to require the assured to prove that the brig was seaworthy for the transportation of coal at the time of the contract. The difference between a representation and a warranty, is, that while the latter must be literally fulfilled, it is sufficient if the former be substantially complied with. In the language of Lord Mansfield, in *1 Term Rep.*, 345, "A representation may be equitably and substantially answered; but a warranty must be strictly complied with."

Having disposed of the question of *allegatio falsi*, we have next to consider whether there was *suppressio veri* in obtaining the policy? It is undoubtedly true that a concealment of facts material to the risk, which the assured is bound to communicate, stands upon the same ground and has the same effect as a statement of material facts which are untrue, and will avoid the policy, whether such concealment be through design or from inadvertence. This brings us to the inquiry, what facts is the assured bound to communicate?

In this case the alleged concealment has reference entirely to matters touching the seaworthiness of the vessel, or going to show that the risk had been declined by others. The authorities all agree, that "if the subject on which disclosures would otherwise be requisite, be covered by a warranty either express or implied, in that case it need not be matter of representation." (3 *Kent*, 286.) "And as in every contract of insurance there is an implied warranty of seaworthiness, the assured need not, in the first instance, disclose any fact, however material to the risk, which tends to show that the ship was unseaworthy when she sailed." *Haywood vs. Rodgers*, 4 *East*, 597. *1 Arnould*, 56.

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It is true this rule is changed when inquiries are made as to matters embraced in an implied warranty. Such inquiries may render it necessary for the insured, or his agent, to disclose facts respecting which he might otherwise be silent. See *1 Phillips*, sec. 601. *1 Arnould*, 518. And it has been argued that the inquiry addressed to Fall, in this case, "What is the condition of the Orb as to seaworthiness?" imposed upon him the obligation of disclosing—

- 1st. The contents of Frisbie's letter of the 20th of October.
- 2nd. The facts and circumstances which had occurred in the port of Baltimore, tending to show the insufficiency of the brig to carry coal.
- 3rd. The fact that the marine reports in Baltimore had discredited her as unseaworthy.

It is clear that there was no obligation upon the assured, or his agents, to disclose any of these things, unless particularly interrogated with regard to them. The insurer had an undoubted right to ask for information upon such matters, and if he had done so, the assured would be bound to make true answers to such inquiries; but in this case no such inquiry was made. The question was general and indefinite, not pointing to any particular fact; it imported no more than an inquiry as to whether the Orb was seaworthy, and imposed no more obligation upon the assured to disclose the matters alleged to have been concealed, than if no question had been asked. The rule is well settled, that the assured is not bound to disclose the fact that the risk has been declined by others, or the estimate they put upon it, unless information on the subject be particularly called for. See *Ruggles vs. The General Interest Co.*, 4 *Mason*, 83. 3 *Kent*, 286.

Upon these grounds we are of opinion, that even if the facts and circumstances to which we have referred were all proved, the agents of the assured were not bound to disclose them, and consequently the omission to do so, would not impair the policy. But the letter of Frisbie, and the other facts and circumstances detailed in the evidence, relating to the condition of the Orb, were all proper to be submitted to the jury,

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and considered by them, in deciding the question of the seaworthiness of the vessel.

The remaining question to be considered, is, whether the underwriters have been discharged by a *deviation*? The proof in the cause is, that the cargo was laden on board by the 19th of November, and that the vessel did not sail till the 22nd of December, and it is contended that this delay in the sailing of the vessel amounted to a *deviation*, which discharges the insurer.

This being a policy on *a voyage at and from Baltimore to Boston*, the risk commenced from the time the lumber was laden on board, and a deviation thereafter will avoid the policy, whether it occurred before or after the vessel actually left the port of departure.

The law on this subject is well stated by *Arnould*, Vol. 1, page 383, sec. 146. He says: "As the sole ground upon which a deviation discharges the underwriter, is, that it *varies* the risk, and as it is evident that the risk may be as much varied by a delay in commencing or prosecuting the voyage, as by a divergence from its prescribed course, it follows that every such delay, if *unreasonable* or *inexcused*, will discharge the underwriter." This principle is sustained by the authorities there cited, and recognized in every elementary treatise on insurance.

In this case it is contended, that the insurance being on the *cargo*, and not on the vessel, and the appellee not being the owner of the brig, and having no control over her, is not responsible, even though the delay amounted to a deviation; and in support of this view the cases in 5 *Mees. & Wells.*, 415, 8 *Mees. & Wells.*, 896, and 2 *Gill*, 365, have been cited. But those cases did not involve the question of a deviation; they turned upon the familiar principle *causa proxima non remota spectatur*, and affirm the rule, that when the immediate cause of the loss is one of the perils insured against, the underwriter is bound, although a remote cause may be *negligence* or *unskillfulness* on the part of the captain and crew engaged in navigating the vessel. The cases in 3 *Peters*, 222, and in 11 *Peters*, 224, are to the same effect.

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The law of deviation stands upon entirely different ground. The inquiry is not whether the loss resulted in any manner from the deviation. *Park on Ins.*, 294. The reason why it is held to avoid the policy, is because it changes the risk, and substitutes a different voyage for the one insured against.

It is as much an implied warranty in every insurance on a voyage, that the ship shall not deviate, as it is that the ship is seaworthy; and each of these warranties is implied, whether the insurance be on the ship or on the cargo. After a careful examination of the numerous authorities cited in the argument, and many others, we have been unable to find any one sustaining the distinction so much insisted on at the bar, between the assured on the vessel and on the cargo, where the question of avoiding a policy by deviation has been involved, although in many of the cases such a distinction, if it existed, might have been properly recognized.

The same observation was made by the learned judge who delivered the opinion of the High Court of Errors and Appeals of Mississippi, in the case of *The Natchez Ins. Co. vs. Stanton Buckner & Co.*, 2 *Sm. & Mar. Rep.*, 340. In that case this question was elaborately considered and decided. An attempt has been made to impugn that decision on the ground that, in some respects, the law of implied warranty therein announced, is contrary to the ruling of the Court of Appeals of this State, in the case in 2 *Gill*, 365. Upon an examination of the cases, however, it will be found that so far as the principle we are now considering is concerned, the cases are not in conflict; and we think the law on this point is clearly and properly laid down in the case of *The Natchez Ins. Co. vs. Stanton Buckner & Co.*, and sustained by the whole current of authorities applicable to the subject.

We have no hesitation in saying, that the delay which occurred in the sailing of the Orb, would amount to a deviation which would discharge the underwriters, unless it proceeded from causes which justify or excuse it. 8 *Bing.*, 317. What the actual causes of the delay were, is a question of fact for the jury. The legal sufficiency of such causes to justify or excuse it, must be decided by the court. 7 *H. & J.*, 291.

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If, as the appellants insist, the delay was occasioned by the proceedings instituted in the Admiralty Court of Baltimore, for the recovery of debts due for repairs and supplies done and furnished to the vessel, then the delay was not legally justified; or, in other words, the risk of such detention is on the assured, not on the underwriter.

It is laid down in *La Guidon de la Mer*, "that the underwriter does not run the risk of obstructions occasioned by the debts, insufficient acquittance, or neglect to pay debts of the assured." See 1 *Phillips*, 590. 3 *Kent*, 378. And upon a careful consideration of the question, we are of opinion that this rule applies, whether the policy be on the vessel or on the cargo. This follows from the principles regulating the extent of the risk assumed by the insurer, and inasmuch as the vessel and owners are responsible to the shipper, under the contract of affreightment, for any loss which he may suffer from such delay, it is not reasonable to hold the underwriter bound, without some stipulation in the contract to that effect. It is not covered by the terms in the policy, "restraints and detainments of all kings, princes, or people;" for the construction of those words, see *Park on Ins.*, 78, 79, 80, 81.

On the other hand, if the delay resulted from the difficulty of obtaining a crew, and there is evidence in the record to go to the jury tending to prove that fact, then the delay would be excusable, and the underwriters remain answerable. 1 *Akyns*, 545, *Motteux vs. London Assur. Co.*

Having thus determined the principles which, in our opinion, govern the decision of this case, we shall proceed, in a few words, to dispose of the several prayers presented in the cause, and found in the several bills of exceptions.

The first bill of exceptions contains two prayers on the part of the plaintiff below, and seven on the part of the defendant. The court granted both those of the plaintiff, and rejected all of those offered by the defendant, except the first.

The first prayer on the part of the plaintiff and of the defendant, respectively, were granted without exception, and are set before us for review on this appeal.

The second prayer of the plaintiff ought not to have been

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granted. This follows from what has already been said in the opinion of this court, and it is unnecessary to repeat here the several particulars in which it is erroneous. It withdrew from the jury the consideration of several facts upon the decision of which, in our opinion, the right of the plaintiff to recover depends; and the judgment must therefore be reversed.

The second prayer of the defendant ought to have been granted, the proposition of law therein contained is correct.

With reference to the phraseology of all the other prayers of the defendant, both in the first and second bills of exceptions, we consider it proper to remark, that, in one respect, they are all objectionable. Each of them, after stating certain facts hypothetically as the basis of the legal proposition, contains the words, and if the jury shall find "*all other facts assumed by this prayer.*" Such a clause is unusual in practice, and, we think, objectionable, as tending to mislead the jury. If there are any facts assumed, the prayer would be erroneous; if there are none, then, in any view of them, the words are unnecessary. We are aware of the reason which led the counsel to insert the words, but think they do not accomplish the object designed; and as this is the first time this court has had its attention called to prayers in that form, we deem it proper to say, that in our opinion such a clause forms a substantial objection, and would vitiate a prayer, although in other respects unexceptionable. Prayers in this form were before the court in the case of *Hopkins vs. Boyd*, 11 Md. Rep., 107, but no point was made upon their particular phraseology, and it would have had no effect upon the judgment of the court in that case.

The facts upon which the court's instruction is asked, ought to be stated in the prayer, otherwise the legal proposition is vague and indefinite, and the jury ought not to be left to speculate and conjecture what facts are assumed by the prayer, and yet are necessary to be found by them, as the ground of their verdict.

Looking at the defendant's prayers as if the objectionable clause to which we have referred were stricken out, we are of opinion, for the reasons already given in stating the general

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principles governing the case, that the 5th 6th and 8th prayers of the defendant were properly refused. They are based upon the defence set up on the ground of misrepresentation and concealment.

The defendant's fourth prayer was properly rejected, because it treats the statement made by Parker Fall, "that the brig would sail soon," as a promissory representation binding upon the assured, which we have said is not its legal effect, or if that be not the true construction of the prayer, it is faulty, because it refers in general terms to the causes of delay "*as given in evidence*," instead of being limited to those which we have said were not sufficient in law to excuse it. There are causes of delay mentioned in the evidence to which we have before referred, which, in the opinion of the court, would justify and excuse it, provided the jury should find they were the actual causes which detained the vessel, to wit, the difficulty of procuring hands at that time in Baltimore.

The defendant's 3rd and 7th prayers (without the objectionable clause spoken of) should be granted; they are in conformity with the principles which have been stated on the question of deviation. But in the expression of this opinion, we are not to be understood as deciding that the captain of the brig had the power of selling or hypothecating the cargo, or any part of it, for the purpose of paying the debts of the vessel previously existing and contracted without reference to the particular voyage, and unconnected therewith. Such sale or hypothecation, under the circumstances of this case, could only have been made by the master, with the consent and authority of the appellee, who was on the spot, and whom it was the duty of the captain to consult. See *Abbott on Shipping*, 243. But whether such efforts to sell or hypothecate the cargo were made or not, it is sufficient to say, that in the opinion of this court the detention of the vessel by the causes referred to in these prayers, if the jury should find they were the causes of her delay, was a risk of the assured, and not one assumed by the underwriters under the contract.

The second bill of exceptions is taken from the refusal of the court below to grant the defendant's 8th prayer, and we

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have already said that such ruling was correct, for one of the reasons assigned by that court, to wit, "because it was not the law of the case;" and we deem it unnecessary to express any further opinion thereon.

With reference to the question presented by the third bill of exceptions, we deem it sufficient to say, that in conducting trials at *nisi prius*, many things necessarily depend upon the discretion of the court, and we think the ruling of the Superior Court, to which this exception was taken, was on a matter within its discretion, and that no appeal lies therefrom.

*Judgment reversed and procedendo awarded.*

(Decided July 22nd, 1858.)

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### Wm. H. KEIGHLER, and others, *vs.* THE SAVAGE MANUFACTURING COMPANY.

An appeal will not lie from an order granting or refusing to dissolve an injunction, until *answer* filed, and an *insufficient answer* is no *answer* for the purpose of an appeal, but it is for *this court*, and not the court below, to judge of the sufficiency of the answer, it being for the *appellate court* alone to determine when an appeal will lie.

A party submitting to answer must answer fully and frankly, and he who evidently and purposely holds back something, cannot complain if he find himself regarded with suspicion and distrust, and be refused that to which he may in truth be entitled, and under other appearances might have obtained.

According to the chancery practice of this State, the motion to dissolve an injunction, and exceptions to the answer, are heard and decided at the same time.

Where an answer refers to a *paper* as showing the dates and amounts of receipts from certain collaterals in the defendants' hands, to a correct and detailed statement of which the complainant was entitled, and such *paper* does not appear in the record, an exception for insufficiency in this particular must be sustained.

It is the duty of a factor to keep books, in which shall be correctly entered the transactions on account of his principal, and the latter is entitled to a correct copy of the entries, including all memoranda connected therewith.

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Where a factor has rendered his account-sales regularly, and the same were settled with *full knowledge* of all their items, and the *names of purchasers* were not then required, it is unreasonable, at any considerable distance of time thereafter, to subject the *factor* to a demand for such names, if his conduct has been honest and faithful, and free from fraud or deceit.

A judgment is the highest exercise of judicial power; *prima facie* it imports verity, and, as to the parties to it, is conclusive, unless mistake or fraud be shown, and the *onus* is on those who impeach it; it should be interfered with or questioned only with great delicacy and circumspection.

If a judgment is confessed with the agreement that it is not an ascertainment of so much *actual* indebtedness, but only a *security* for so much as thereafter might be ascertained to be due, equity will prevent any use of the judgment for a different purpose, but the proof of such an agreement must be abundantly full and explicit, so as to leave no doubt on the mind of the court.

Good faith is the paramount and vital principle of the law governing the relation of principal and factor; the latter cannot *purchase* for himself the property of his principal consigned to him for sale to others, except with the knowledge, consent and approbation of the principal, upon a free, full and frank disclosure of every circumstance connected with the transaction, and a total absence of all fraud and concealment.

#### APPEAL from the Equity Side of the Superior Court of Baltimore city.

This appeal was taken from an order of the court below (LEE, J.,) continuing till final hearing, or further order, an injunction which had been granted upon a bill filed by the appellee against the appellants, and sustaining certain exceptions filed by the complainant to the answer of the defendants, for insufficiency.

The bill alleges that the defendants, as partners under the co-partnership name of Duvall, Keighler & Co., were, from the 1st of January 1850, to the 1st of June 1851, agents and factors for the sale of cotton goods manufactured by the complainant; that becoming somewhat embarrassed, and being sued by other creditors, complainant, at the September term 1852 of the circuit court for Howard county, in accordance with previous assurances, confessed a judgment in favor of the defendants for the nominal sum of \$10,000, as a *collateral security* to secure such amount of indebtedness to them as upon a full and fair accounting, might thereafter be ascertained to

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*be due*, and that this judgment was confessed upon the express agreement and understanding that the same was but a *collateral security*, and designed to put the defendants in the same condition precisely, as to security, as were the other creditors who had sued; that at the time this judgment was rendered, the defendants had in their hands, as collaterals for any sum that might be due them, one-half of a debt of \$15,000, due the complainant by Mason & Son, of Baltimore, on their notes, and amply secured by mortgage, and which has been paid to the defendants, except perhaps a small part, for which the Masons have given them additional bills receivable; that complainant still confiding in the friendship of the defendants, and still consigning to them as usual, they, on the 22nd of March 1853, when complainant's chief officer or treasurer was, to their knowledge, lying dangerously ill, and when two of its corporators on whom, as the defendants well knew, complainant chiefly relied for the management of its affairs, were absent from Baltimore, and without any prior accounting with complainant, or applying and crediting to said judgment so much of said collaterals as had been realized, and the balance in process of being realized, and without any demand of any pretended indebtedness, and, in fact, without any notice or warning whatsoever to any stockholder or officer of complainant, issued a *fi. fa.* on the judgment so rendered merely as a collateral, and levied the same for the whole amount thereof upon all the lands and possessions of every kind and nature of the complainant; that this act of bad faith on the part of the defendants, in reference to a judgment confessed merely as a collateral, induced the complainant to investigate the accounts and dealings between them, for the purpose of ascertaining whether, upon a fair accounting, any and what amount was due upon the defendants' pretended claim, the great confidence which the complainant, through its agents, up to this time, had in the defendants, having lulled all suspicion as to the accuracy of their accounts.

The bill then charges, that upon such examination, so far as could be ascertained from the face of the accounts, enough appears to show that the accounts, sales, and accounts current

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rendered complainant from the 1st of January 1850, to the 1st of June 1851, are untrue and fraudulent, and when properly restated, it will be found that defendants are indebted to the complainant; that many and large amounts of complainant's fabrics consigned to the defendants for sale to others, have been returned as sold, when, in fact, they themselves have secretly and without complainant's knowledge or consent, taken said goods to their own account, and have resold the same at great profits, for which they have not accounted; that from time to time they have sold complainant's goods to purchasers at less than their market value, as an inducement to such purchasers to buy defendants' own goods; that from time to time they have sold, without authority, goods of the complainant so consigned to them, at prices lower than the rates fixed therefor by complainant's agents, and, in violation of instructions given by such agents, have sold such goods, when such agents, anticipating an advance in prices, have directed them to be withheld from the market, and which anticipations have always been realized, and that at such times defendants have made large sales to themselves, on the eve of such advances, or when such advances were actually taking place, or had taken place, thereby realizing great profits to themselves, which ought to have enured to complainant, and have thereby deprived complainant of all benefit of the rise in value of said goods, when such rise took place; that they have also fraudulently returned sales of goods as having been sold as of certain dates, when, in point of fact, such sales were really made at dates long prior to those reported, and that such sales have, contrary to law and equity, been credited with interest, as if made on the last day of the months in which they were reported, and not from the actual dates on which they were really made; that by means of these devices and others unknown to complainant, and also by compounding interest on balances which included interest, the accounts rendered have included heavy charges for interest against complainant, whereas by a proper statement of the accounts, according to the actual dates of the transactions, a large amount of interest would be found due complainant; that such accounts also contain charges additional

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to that of five per cent. for commission properly chargeable, and also charges of five per cent. for commission and guaranty on goods not sold, but secretly taken to defendants' own account.

The bill further charges, that since the rendition of the aforesaid judgment, many and large payments on account by collaterals of complainant held by the defendants, have been paid to them, and which were made prior to the issuing of the execution thereon, and which were not credited on the judgment; that said accounts are fraudulent and inaccurate in divers other respects, which complainant is now unable to specify, because the same alone appear in the account books of the defendants, and to which complainant, by means of its officers and agents, has not access, and each and all of which said books of account, so far as the same contain any entries whatever relating to the sales of complainant's goods, are as much the books of the complainant, as principal, as they are the books of the defendants, as complainant's agents and factors; that with a view to obtain the exact truth of the matters before stated, complainant, through Geo. H. Williams, its attorney, and one of its corporators and directors, applied to the defendants for leave to examine said books so far as the same related to the affairs of complainant, which proper and lawful application has been steadily and constantly refused by them; that after the execution aforesaid was issued, a proposition for arbitration was made and assented to, but after considerable negotiation failed, principally because defendants found that their books of account would be required to be produced, and which they allege the law will not coerce them to produce, and after countermanding the execution preparatory to such arbitration, the defendants now threaten to renew the same.

The bill then prays an answer on oath, and that the defendants may exhibit an account with complainant, setting forth truly and accurately, from the 1st of January 1850, to the 1st of June 1851, the exact day and date of all the sales of complainant's goods sold by them, the quantity thereof on each date, the persons to whom the same were sold, and the residence of such purchasers, the true prices and credits on

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which the same were sold respectively; that they may set forth a true and accurate account of the quantity of goods taken to their own account, as aforesaid, and the times respectively when so taken, and their subsequent disposition of the same, the times and dates when, and the exact prices and credits at which, and the names and residences of the purchasers to whom the same were sold; also an exact statement of the times, prices, and names and residences of the purchasers, and the quantities of goods sold at less than the market price to induce sales of their own goods, and that the defendants may produce and discover each and all of the original books of account and entries containing any and every account whatsoever, relating to the sales of complainant's goods, and that, upon such production and discovery thereof, complainant may be permitted to surcharge and falsify the same, as well in the particulars herein mentioned, as in all others which may be made apparent in the progress of the cause, and for an injunction restraining the defendants from all further proceedings upon the judgment aforesaid, and for general relief.

The injunction was granted accordingly, upon bond in the penalty of \$15,000 fixed and approved by the judge.

The answer in reference to the judgment, explicitly denies that it was taken as a security merely for a nominal sum of \$10,000, or as a collateral security to cover any balance that might thereafter be ascertained to be due, upon a full and fair accounting between the complainant and the defendants, but they state that it was given as a *specific* security for \$10,000, parcel of an acknowledged indebtedness of complainant to the defendants, then existing, of \$14,862.36, and that it was intended to convert that amount of indebtedness into a judgment, so as to take it out of their account current, and that it was accordingly taken out, and has thenceforth been considered and treated as a *judgment debt*. They further show that this judgment was confessed by the complainant in the face of opposition, in open court, of Amos A. Williams, one of the corporators of the company, and at that time in litigation with it, and with the sanction of all the parties then having the management and control of the corporate affairs of the complainant.

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They further show that they had advanced for the complainant, by payment to another firm, with the concurrence of the complainant, a large amount of money, and which furnished part of the indebtedness of complainant to the defendants at the time this judgment was given.

The answer then denies all fraud of every kind imputed to the defendants, and proceeds to answer at length the several allegations of the bill, but for the purpose of this appeal, it is only necessary to state such parts thereof as the exceptions sustained by the order appealed from refer to.

These respondents state, that after the rendition of said judgment, they, under the written instructions of their counsel, credited complainant in their account current, as of the 20th of September 1852, with the amount of the judgment, and opened a new account, termed judgment account of the Savage Manufacturing Company, and after applying the collaterals as received to the extinguishment, in the first instance, of the balance due respondents on the old account current, there was a balance remaining to the credit of the company—the proceeds of said collaterals—of \$1647.07 to be credited as of the 15th of February 1854, in part of the judgment for \$10,000, bearing interest from the 31st of March 1853, to which last mentioned day interest thereon was paid by the complainant. In another part of the answer they say, on this point, they admit they held as security one-half of certain collaterals, being a debt due the complainant by Mason & Son, and that from said collaterals they realized certain sums which paid the residue of the indebtedness of the complainant, over and above the amount of the judgment, and produced a balance in payment *pro tanto* of said judgment as of the 15th of February 1855, of \$1647.07, and they deny that they have received any further sum, in any way, on account of said judgment, except payment of the interest thereon up to the 31st of March 1853.

They say it is not true that they took goods to their account secretly, and without the knowledge or consent of the complainant. They admit it is true that goods were taken to their account at several times, but always with the full knowledge,

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consent and approbation, and sometimes at the pressing solicitation of George Williams, the known and authorized agent of the company, and with whom chiefly, during his lifetime, respondents had intercourse in their dealings with the complainant. And in this connection they state that it frequently happened that purchasers desired to purchase in quantities less than a bale, and in order to supply them with complainant's goods, respondents would take to account a bale at the then current rate, and that this course of dealing was well known to, acquiesced in, and approved of, by said George Williams, and was, in fact, beneficial to the complainant, and that it sometimes happened that the prices at which the goods were so taken to account, exceeded those at which respondents resold them. They further say they never took goods to their own account, unless in case of single bales, without the express previous sanction and knowledge of the agent of the complainant, and that sometimes, in fact, they so took goods to their account against their own wishes and interest, yielding to the urgent and importunate request of said George Williams, who desired, for the use of the complainant, occasionally to have a larger credit with respondents than the state of their accounts and the course of dealing between them would have justified unless such goods were so taken to account, and that when so taken, they were always taken at current prices, and were sometimes sold at an actual loss.

Further answering, respondents state that the allegation in the bill, that they sold complainant's goods at any time at less than their market value, to induce purchasers to buy their own goods, is utterly untrue. They say that sometimes prices were limited at a rate higher than the market value, yet, with some few exceptions, they did not at any time sell under the limit, and whenever they did so, it never resulted in any loss to the complainant, and the fact was always made known to said George Williams, and the sale sanctioned, approved and ratified by him, and in any instance in which they may have omitted to comply strictly with instructions, they took on themselves the risk of loss, and bore it when any in fact occurred; and they expressly aver that sometimes they charged themselves

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in account for goods as sold at certain prices, when in fact they received a less price, and did so uniformly whenever they sold at any price less than the limited price, and objection was made by said George Williams. All these matters were known to and understood by said Williams, and fully sanctioned and approved by him, and they deny that they made sales to themselves at any time, save with the sanction and knowledge, and sometimes at the urgent solicitation, of said Williams, whilst acting as treasurer of the complainant.

They further deny that the accounts by them rendered are unreal or fraudulent, or made for the purpose of concealing from complainant the true and accurate result of their sales. The accounts were correct; sometimes it may have occurred, and most probably did occur, that the precise dates were not accurately given. This may have arisen from taking an average date of sales made in the course of several days, or of a week, or even of several weeks, where the sales may have been sparse, or by inadvertence sales may have been omitted to be entered at the proper time, and afterwards may have been entered as of the date when the error was discovered. They further say that they rendered regular accounts of sales made, and of goods taken to account, and by these accounts the dates from which interest was computed plainly appeared. These accounts were stated according to usage and general custom, and in accordance, moreover, with the known and established course of dealing between the complainant and these respondents, and if there had been any reasonable ground of objection on this score, the objection would have been, as it ought to have been, promptly made by the said George Williams, agent and treasurer as aforesaid.

They further state that all the accounts were honestly and truly rendered, and that it is not true that any such alleged frauds or inaccuracies would appear by the account books of these respondents. No account books were ever kept in which complainant has, or ever had, any interest or property; full and accurate accounts being rendered regularly by respondents to the complainant of all the dealings and transactions between them. They admit that George H. Williams did apply to them

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for leave to examine their books with which request they declined to comply, and for the sufficient reason that he had no right to examine their private books, and because they had no book or books in which he or the complainant had any interest or property whatever, and they state that they never kept any such book or such books concerning the business of the complainant as stated in said bill.

Further answering, these respondents say that the complainant, in the accounts regularly rendered by them, has been furnished truly and accurately with the items of account from the 1st of January 1850, of all the dealings and transactions between them in every particular, and as far as they know and believe, the accounts so rendered are correct, although they will not aver that there may not be errors in date, but if such errors there be, they have not the information or means of now correcting them. That they are unable to give any other or further information than the accounts rendered by them furnish and afford; the said accounts were truly stated, and are substantially correct, if not exactly so. These respondents say that, if bound to do so, they can probably state the names and residences of many of the purchasers of goods, but they are advised, as no such requisition was made at the times the accounts were rendered and approved, they are not now bound to take this extra trouble; and they further state that, by the usage and custom of trade, the names or residences of purchasers are never stated in rendering account sales, where the sales are guaranteed. They aver that the prices stated are the true prices at which sales were made, and the credits stated are the true credits at which the same were sold, although there may be instances in which, pending a limit, where persons were unwilling to purchase at so high a price as the limit, the goods were delivered upon the understanding that the same should afterwards be considered as sold at the then market price, when the limit should be taken off, or when the market price should attain the limit, whichever should first happen. They do not remember any case of this kind, nor do they know that there was certainly any such case, but it is possible such instances may have occurred, and hence the qualification

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here made. They further state it is impossible for them to say whether goods taken to account were sold at a profit or a loss, or to whom sold, or when; with great labor some of the bales could probably be traced, but they are advised that, as all goods taken to account were so taken with the knowledge and concurrence, and generally at the instance of said George Williams, it is of no concern to the complainant in what manner, to whom, when, or at what prices the same may have been disposed of by these respondents. They again deny all fraud and all allegations of fraud, in whatever terms, charged or insinuated in and by the bill, and as to any supposed or pretended mistakes, they say that the several monthly and all other accounts rendered by them were plainly stated, were unambiguous and clearly intelligible, even to the plainest understanding; that the quantities of goods sold, and the quantities on hand, were always distinctly stated; that the dates on which the sales were reported to have been made, were always given, and it was in the power of any one who kept the run of the calendar, to ascertain whether the date was on the Sabbath, and to have pointed out the fact; that the prices at which the sales were made, were always distinctly and accurately stated; that the times of credit were always distinctly and plainly set forth; that the time from which interest was to be allowed, was always plainly stated, and it was, therefore, in the power of the agents and officers of the complainant to have made objection, if any objections existed, as the grounds of such objections were plainly and obviously apparent on the face of said accounts.

To this answer the complainant filed exceptions, both for *impertinency* and *insufficiency*. All of the former were overruled by the court below, and also all of the latter, except the following, which were sustained:

7th. For that they have failed to answer the allegation that, prior to the issuing of said execution, and since the rendition of the judgment, many and large payments on account, by collaterals, had been paid to them, and which were not credited thereon prior to said execution.

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8th. For that while in said answer they have admitted their factorship, as alleged in the bill, they have failed and refused to discover and describe the books of account kept by said defendants, in which the accounts of sales of complainant's fabrics are registered, and which, as factors, they were bound to keep, and in which, as the bill states, the frauds which are charged in the bill alone appeared.

9th. For while they admit in their answer that limits as to price were placed on complainant's fabrics so consigned, and that they sometimes sold under said limit, and that said George Williams sanctioned such sales, yet they do not state how often, when, and to what amount such sales under limits were made, nor to whom such sales were made, nor do they say when and to what amount said George Williams sanctioned such sales.

10th. For that while they admit that they sometimes charged themselves with goods at certain prices, when in fact they sometimes received for them less prices, and did so uniformly when such sales were not sanctioned by said George Williams, yet they do not say when, or how many goods, or to what amount, they so took to account, nor their subsequent disposition of them.

11th. For that while they aver that they never made sales to themselves at any time of complainant's goods, save with the sanction and knowledge, and usually at the solicitation of said George Williams, yet they do not state what amount of sales were so made to themselves, nor when, nor to what extent, nor the number of times.

12th. For that while the bill charges that the pretended dates in their accounts of sales are untrue, and not the real dates of sales, and various evasive suppositions are set forth by way of answer thereto, yet they do not say whether they ever made such sales on Sundays or not, nor whether they did or did not render precise dates, nor whether such dates in such accounts correspond with the dates in their books of account, nor whether they believe the said dates to be the true dates of sale.

13th. For that they have failed to answer, and do not give

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the names and residence of the purchasers of complainant's goods, as called on by the bill so to do.

The defendants then filed answers to these exceptions, in which they say, in answer to the 7th exception, that after the rendition of said judgment for \$10,000, they credited the complainant's account with that sum, and opened a new and separate account in respect of the judgment, leaving the balance of their old account thus reduced under its former head. This was done in accordance with the directions of their counsel, whose letter of instructions, dated 1st of October 1852, herewith filed, marked X 3, was strictly followed. All receipts from collaterals, when and as received, were credited to the complainant, and the residue, after satisfying the balance not embraced in the judgment, was credited upon the judgment. The paper herewith filed, marked X 4, shows the dates and amounts of the receipts from collaterals in their hands. [This paper does not appear in the record.] They however state, that in point of fact, some of the money was actually in hand (and interest is thereon allowed to the complainant from the time it was so in hand) previous to the date at which it is credited, but the same was paid by the trustee under the Mason deed only on condition that the firms receiving the same would give their notes therefor, so that such payment was not in fact a credit, or to the use of the complainant, inasmuch as respondents would have had to refund the same by payment of their notes, if the title of the complainant in the pending controversy had been pronounced invalid. In reply to the 8th exception, they say that the statement in their answer in this behalf is true. They have no such books as are supposed in the bill. In answer to the 9th exception, they say they are unable to give more definite answers than are contained in their answer already filed. The accounts from time to time rendered, embrace all such sales, and were and are just and true, and were fully examined, understood and approved. In reply to the 10th exception, they say they are unable to give any further information than is contained in their answer, respecting the matters specified in this exception. To the 11th, they say they are unable to answer more definitely than as set

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forth in their answer. The accounts, as rendered, truly and fully embrace all the particulars specified in this exception, although it is now impossible to point out the items. In answer to the 12th, they say that they never made any sales on Sunday, and if any dates in any accounts rendered by them indicate Sundays, then such dates are erroneous. Sometimes average dates may have been taken, and in such cases, if any, the average date may have been inadvertently adopted, without noticing that the same fell on Sunday. They, however, are not aware, nor do they admit, that there were erroneous dates in their accounts, and the statement in this behalf in their answer was merely hypothetical. They believe that the true dates of sales are stated in their accounts as rendered, and that in cases, if any, of average dates, that the average dates are truly and accurately stated. In answer to the 13th exception, they insist, as stated in their answer, that they are not bound to ascertain the names and residences of purchasers, and that it is not now, and was not at the time said accounts were rendered, the custom of Commission Merchants in Baltimore to render the names or residences of purchasers in case of such agencies, although if at the time said accounts were rendered, or within any reasonable time thereafter, the same had been requested, these respondents would promptly and with great pleasure have furnished all desired information. At this period it would be a work of much labor to comply with the demand, even in a partial degree, and it would be now impossible to comply with the same to any considerable extent.

A motion was made by the defendants to dissolve the injunction, and the complainant asked leave to take testimony in support of the allegations of the bill, and a mass of evidence was taken, which need not be stated, inasmuch as the appeal was dismissed by this court, for the reasons stated in their opinion, and no final decision was pronounced on the merits of the case as disclosed by this testimony. The motion to dissolve and the exceptions were heard at the same time, and the court passed an order overruling all the exceptions, save those before stated, which were sustained, and the defendants required to make further answer thereto, and continuing the

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injunction till final hearing or further order. From this order the defendants appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*Wm. Schley* for the appellants:

The bill is based upon the alleged *fraud* of the defendants as factors, and the object is to obtain a *general account* of the dealings between the parties as principal and factors, from the 1st of January 1850 to the 1st of June 1851, being the period of the existence of such relation. The *judgment* is not assailed as having been obtained by fraud, mistake or surprise, but its efficacy is sought to be *controlled* by an alleged agreement, that it was not to operate and have effect as a judgment, but only as a security collateral to an account thereafter to be taken for such sum, if any, as should appear to be due as the result of such account, and the injunction against execution of the judgment is prayed, as *ancillary* relief to the principal relief sought by the bill. Hence, two corollaries follow: 1st, if the complainant is not entitled to an account the injunction should be dissolved. *Accessorium sequitur sum principale.* 4 Md. Ch. Dec., 50, *House vs. House.* 4 Gill, 472, *Geiger vs. Green.* And 2nd, if the alleged agreement, that the judgment should only operate and have effect as a provisional judgment, be not sustained by competent proof, the injunction must fall even if the bill be retained as a bill for an account. And the appellants insist, that the appellee is not entitled to an *account*.

1st. Because the appellee has no real interest in the suit and can neither gain or lose by the result, and also because persons are interested in the suit, who are not parties thereto. The answer charges, and the allegation is sustained by the proof, that by some agreement the suit is prosecuted at the individual risk, and for the individual gain and profit of George H. Williams and Nathaniel Williams or one of them, and if this be so, the corporation has no real interest in it, and these persons should be made parties to it: *qui sentire commodum sentire*

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*debet et onus.* Adams Eq., 702. Mitford's Pl., 259. 1 Story's Eq., sec. 503. The case in 9 Beavan, 292, *Clarke vs. Tipping*, is widely different, and there the persons whose beneficial interest was doubtful were made actual parties, and the complainant in that case had in his own right a contingent interest, and had, by derivation of title the interests of two of the creditors.

2nd. The account between the parties having been in fact stated and closed by the complainant's note, the complainant cannot maintain the ordinary bill of account, which lies only where *no* adjustment has taken place. A *settled* account can only be impeached for error or fraud. 1 Gill, 350, *Stiles vs. Brown*. If impeached for *error* (without fraud) the complainant is only permitted to surcharge and falsify, and is not entitled to a general account. 1 Md. Ch. Dec., 306, *Williams vs. Savage Manf. Co.* 1 McN. & Gordon, 93, *Allfrey vs. Allfrey*. If impeached for *fraud*, the fraud must be palpable and be clearly proved by undoubted testimony. Note to Macnaghten's Select Cases, in 74 Law Lib., 97. The rule requires *convincing proof*—no *acquiescence with knowledge*, no unnecessary *delay* after the detection of the fraud in making complaint—no *antecedent neglect* in making proper and necessary examinations of the accounts. 1 Story's Eq., secs. 523 to 527.

3rd. The fraud alleged in the bill being flatly denied by the answer, is not sustained by *any proof* which even justifies a *suspicion*, much less maintains the *hypothesis of fraud*. The exhibits adduced as specimens of the accounts, are not wrong in any particular, but if wrong they were not rendered during the agency of these appellants. The complainant has possession of the accounts rendered by the defendants, and *not one* is produced or shown to be even *wrong* much less shown to be *fraudulent*. The transactions of the former firm, whose account these appellants satisfied with the sanction of the complainant, cannot be investigated in this suit, as they are not parties. So as to the accounts of the succeeding firm; and for two reasons, *firstly*, because other persons are interested who are not parties, (2 Gill, 481, *Hardesty vs. Wilson*,) and *sec-*

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**only**, because the period covered by this bill is limited to the time, between the 1st of January 1850 and the 1st of June 1851.

4th. Even if it can be assumed, as alleged in the bill, that the accounts show fraud on their face, it would not aid the complainant, as it was clearly a duty to repudiate and reject the accounts at once: *vigilantibus non dormientibus subveniunt leges.* 5 Md. Rep., 367, *Falls vs. Robinson*.

5th. As to mere *irregularities*, as selling under limits, for instance, these were not necessarily fraudulent, and damages could have been recovered at law for the breach of any such orders. But the accounts on their face disclosed the terms of sale, the prices, the credit, and the quantities sold. By examination of the accounts, these imputed irregularities could have been detected, and in fact the accounts were examined, and all differences in these respects were amicably settled and adjusted.

6th. And as to so much of the note as was made up of the sum paid by the appellants to the former firm, even *fraud* on the part of *that* firm, if any could be shown, could not avail the complainant as against these defendants, because the accounts of that firm cannot be investigated in this suit, and secondly, the sum was paid with the concurrence of the complainant. Upon no ground except the mere *presumption* of fraud, can the complainant have such an account as claimed; and it is not a bill surcharging and falsifying items which resulted in the two settlements mentioned in the evidence. The bill therefore, even on the motion to dissolve ought to be dismissed. 4 Gill, 472, *Geiger vs. Green*.

But even if the complainant is entitled to the account asked by the bill, still the injunction ought not to have been continued, because the alleged agreement in regard to the judgment was denied, and has not been proved. And on this point the appellants insist:

1st. No *collateral* judgment was asked for, but a simple ordinary judgment for a specified sum, parcel of a larger acknowledged indebtedness not deemed sufficiently secured by the collaterals held by the creditors, and the object was to

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convert so much of the debt, so insufficiently secured by the Mason collaterals into a *judgment debt*, and take the amount out of the account. This is the tenor of the correspondence offered in evidence, and is the effect of the judgment itself. It was so understood by the counsel for the creditors, and so understood by the defendants. The evidence of Bradenbaugh only shows that *pending* transactions, not *past* settlements, were to be closed and the collaterals were to be credited. If the intelligent counsel for the company had so understood the transaction, at the time, he could have had it entered as *part of the judgment*, and as Amos A. Williams equally suspected all parties to the suit, and as he only desired to have a *point left open* for future controversy, such a paper would have removed, undoubtedly, his strenuous opposition to the judgment. But even if Bradenbaugh's evidence is clear and unambiguous, and even if it were competent evidence, it would not avail to establish the agreement, as against the positive answer of the defendants, whose answer was demanded on oath.

2nd. But the evidence of a parol agreement, even if proved by a score of witnesses, would not avail to vary the effect and operation of the judgment, it being conceded, that such a security was intended to be given as was in fact given. 1 Pet., 1, *Hunt vs. Rousmaniere*. 2 Md. Rep., 25, *McElderry vs. Shipley*.

3rd. Besides the technical estoppel by the record, the complainant is barred by an estoppel *in pais*, by reason of the proceedings in Howard county court. The complainant there affirmed (and it enabled the plaintiff in the judgment to overcome the opposition of Amos A. Williams) a state of case utterly inconsistent with the theory of this bill. In attempting to do so the complainant is seeking to perpetrate a fraud upon justice.

4th. Solemn acts of courts of justice are not to be transacted as if mere mockeries. They are not to be used to prevail for one purpose and to be powerless for another. They import absolute verity, and the attributes and incidents annexed to them by law are not to be annulled on mere suggestions of

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fraud or error. It must be clearly *proved* and the complainant must be free from blame. 2 *H. & J.*, 179, *Contee vs. Cooke*. 6 *G. & J.*, 312, *Gott vs. Carr*. 7 *Gill*, 190, *Briesch vs. M'Cauley*. 9 *Gill*, 420, *Beard vs. Hubble*. 5 *Md. Rep.*, 367, *Falls vs. Robinson*.

But the objection is now made, that the appeal has not been brought before this court in the manner required by the act of Assembly, and the cases of *Richter vs. Pue*, 9 *G. & J.*, 475, and *Hardesty vs. Wilson*, 2 *Gill*, 481, are relied on. But independently of the effect of these decisions as binding authority, on general principles it is clear, that the question of the sufficiency of an answer on a motion to dissolve, is a practical one, that is to say, if the bill on its face is without equity, then however imperfect the answer may be, the court will dissolve the injunction, without regard to the insufficiency of the answer. (3 *Bland.*, 132, 162, 163, *Salmon vs. Clagett*. 5 *Md. Rep.*, 367, *Falls vs. Robinson*. 7 *How.*, 726, *Hardeman vs. Harris*.) If it meets and displaces the equity of the bill, (where the bill on its face presents a *prima facie case*,) it is enough to justify a dissolution, however short the answer may be as to matters not material to the equity of the bill. 4 *Price*, 339, *Scott vs. Becher*. 13 *Price*, 294, *Bally vs. Kenrick*. *Wigram on Discovery*, secs. 273, 278, in 13 *Law Lib.*, 197, 198. How can an answer be insufficient *quoad* the injunction, if the injunction would still be dissolved, if the matters excepted to were not answered? The court below ought to have dissolved the injunction, because the complainant is not entitled to such an account as is claimed, and the alleged agreement as to the judgment has not been proved. But it is said, the decision of the judge is not open on this appeal, and the case in 2 *Gill*, is relied on as decisive on the point, and I admit the conclusiveness of that decision on this point, that the order sustaining the exceptions is not open *for review* on this appeal; that is, this court on this appeal will neither *affirm* nor *reverse* that part of the order appealed from, which sustains the exceptions, however erroneous the order may be. In the case in 2 *Gill*, the appeal was brought up under the acts of 1832, ch. 197, and 1843, ch. 73, from an order dis-

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solving an injunction. The court affirmed the order, and the appellant desired to open, on the appeal, the question as to the propriety of the order in relation to the exceptions, for the purpose of sustaining the appeal. But the plaintiff's right to an injunction did not depend on the question of the sufficiency or insufficiency of *the answer*, but on the case presented by him in his bill, which, so far as not denied by the answer, was assumed to be true. The decision proceeded manifestly on the ground of a total want of equity on the part of the appellant to an injunction. But as in such an appeal no condition is required, that an answer shall be first filed, the only condition being, that the appeal shall be brought up within thirty days, it is manifest that the case is no authority respecting an appeal under the act of 1835, ch. 380. That case was brought up in time, and it was properly before the court for review *only* so far as respected the injunction. If the question of jurisdiction to hear the appeal had depended on the preliminary question of the sufficiency of the answer, it does not follow from any thing said in that case, that the question of sufficiency would not have been *considered*, not for the purpose of *review* of the order respecting the exceptions, but for the purpose of deciding whether this court had or had not jurisdiction of the appeal, from the order dissolving the injunction.

The case in 9 *G. & J.*, 475, was, however, an appeal from an order refusing to dissolve the injunction, and the court dismissed the appeal. The *mere decision*, as no opinion was filed, is no binding authority in any subsequent case not identical in its circumstances. 8 *Md. Rep.*, 387, *Edwards vs. Bruce*. And if the court meant to establish the doctrine contended for by the appellee, it is to be presumed that they would have filed an opinion announcing the important rule sought to be deduced from that case, especially as cases were coming up every term under this act of 1835. The court *may* have decided, that the decision of the court below was conclusive on the appeal from the order continuing the injunction, or, on the other hand, they may have decided that, *in the opinion of this court*, the answer was insufficient, and, therefore, the appeal was before them for review, as the right of appeal

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from an order refusing to dissolve, is given *on the condition* that an answer must be first filed; and this court may have further decided, that the matter of the bill not answered, was *material* to the equity on which the injunction was based. On looking at the record in that case it will be found, that whilst the chancellor overruled the exception as to the non-production of a book therein described, yet the exception which was sustained, concerned a matter material to the equity of the bill on which the injunction was based. To assume that this court adopted, as conclusive upon the appellant and upon the Court of Appeals, the decision of the inferior tribunal, would render the beneficial and beneficent provision of the act of 1835 a very precarious protection, and would, in many cases, annul *the right of appeal*. And it is for this court to decide, in all cases, whether an appeal properly lies. 6 H. & J., 302, *Thompson vs. McKim.* 11 G. & J., 137, *Oliver vs. Palmer & Hamilton.* 1 Md. Ch. Dec., 328, *Chesapeake Bank vs. McClellan.* And how can the court decide the question of its jurisdiction, without determining for itself whether an answer has been filed or not? Wherever the question of jurisdiction depends upon the ascertainment of a preliminary fact, the court, which is to decide the point of jurisdiction, must, *for that purpose and to that extent*, consider and decide that preliminary fact—not as in review of the decision of another tribunal, but as original question properly arising for decision on the point of jurisdiction. And it may happen, in a particular case, that an answer is sufficient as respects the injunction, and yet *insufficient* as to the general case presented by the bill.

But the exceptions are really hypercritical. The answers are full and ought to have been satisfactory. The observations of the master of the rolls, in *Jodrell vs. Slaney*, 10 Beavan, 229, are applicable to this case. The 7th exception is unfounded. The bill states that the execution issued on the 22nd of March 1853, and was countermanded. The bill was filed on the 30th of January 1854, and the answer states that the defendants had received from collaterals sufficient to pay the balance of the claim and interest, and to leave applicable

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to the judgment \$1647.07, as of the 15th of February 1854, and the further answer shows, that the receipts from collaterals were credited when and as received. The account therewith filed (X 4) has been lost, *but it was filed*. But the question is immaterial. What matters it whether money had been received before the execution or not? On a motion to quash it might have been material. But that execution was countermanded, and is *functus officio*. The eighth exception was sufficiently answered. The defendants denied that they had any such books, and the denial is repeated in the answer. What more can be required? If you seek discovery from a defendant you must take his answer; and his evidence on a motion for production cannot be questioned. *Adams Eq.*, 14, 17, and *notes*. *Wigram on Discovery*, secs. 273, 278. But if the defendants had, in terms, refused to produce their books, and had acknowledged that in these books there might be more particular information, what right has the complainant to look into these books? It is a new system of discovery, to charge a party with fraud and then ask to look into the private books of that party and take the chances of there finding evidence against him. And above all, *cui bono*, should the defendants produce their books or any books to prove the alleged fraud? The complainant is not entitled to an account as prayed, and manifestly not entitled to the continuance of the injunction, and, therefore, the exception concerns a matter not material to be answered. But again: where you seek discovery on oath you cannot also ask for production of books. You must ask for a schedule, and if the defendant admits he has them, you may move for production, but if he denies that he has them, you cannot contradict his answer and prove it *false* for the purpose of establishing its *insufficiency*. *Adams Eq.*, 14, 17, and *notes*. The other exceptions are in principle the same. They assume, that where accounts have been rendered, they may be called for at any future period in another and more particular form than was originally required. They depend on the same principle as the seventh and eighth exceptions.

But again, in point of practice, the injunction was improperly

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issued; for bond ought to have been given in double the amount of the judgment. *Act of 1826, ch. 200, sec. 1.* 5 *Gill*, 188, *Alexander vs. Ghiselin*.

*Geo. H. Williams* and *Thos. S. Alexander* for the appellee:

1st. The appellee moves to dismiss this appeal, for, that the exceptions to the answer having been ruled good and a further answer required, and the appellants having failed to make such further answer, they are not entitled to appeal under the provisions of the acts of 1835, ch. 346 and 380. The right to appeal from such an order, was given by these acts *on condition* of "the *answer* of the defendant or defendants being *first filed*," and an answer ruled *insufficient* upon exceptions, is according to chancery practice *as no answer*. This was the point decided in the case of *Richter vs. Pue*, 9 *G. & J.*, 475, which was argued before a *full court*, and decided without dissent. It is not for *this court* to decide upon the sufficiency of the answer; all that they have to do is to look to the record in order to see whether there is an *answer or not*, and if they find there is no answer, then, according to the acts of Assembly, they have no jurisdiction to entertain the appeal. And if the court below has decided the answer to be *insufficient*, it is just as effectual to prevent the appeal as if no answer appeared in the record.

2nd. But if the court decide that the appeal is well taken, then it is insisted, that the proper and only subject for revision, is the correctness of that part of the order appealed from which continues the injunction. No appeal will lie from an order sustaining exceptions to an answer. *Act of 1835, ch. 185.* In the case of *Hardesty vs. Wilson*, 2 *Gill*, 481, it is expressly decided, that on an appeal from an order dissolving the injunction and overruling exceptions to the answer, the exceptions are not before the court. And the right of the parties to review the order of the court in regard to exceptions, must be mutual and reciprocal.

3rd. But if this court should think the exceptions are now before it for any purpose, it is then insisted, that exceptions for scandal or impertinence are not overruled, by exceptions

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taken at the same time for insufficiency. That by the Maryland practice the exceptions are heard together, and at the time of hearing the motion to dissolve, and, are therefore not overruled by the complainant's taking testimony in support of his injunction, to be used at the hearing of the motion to dissolve. 1 *Bland*, 181, *Jones vs. Magill*. *Ibid.*, 353, *Gibson vs. Tilton*. 3 *Bland*, 400, *Price vs. Tyson*. *Ibid.*, 132, 133, *Salmon vs. Clagett*. And that if the rule were, in strictness, otherwise, the appellants have waived their right to take advantage of it, by submitting to answer some of the exceptions, and by arguing the merits of all the exceptions. And in further support of this point, it is insisted, that the exceptions sustained by the court below were well taken. That a defendant submitting to answer must answer fully, is settled in this State by the case of *Warfield vs. Gambrill*, 1 *G. & J.*, 511. The answer must apply to every material averment, and to all the particulars in which discovery may be necessary to the case stated by the plaintiff, and on the hypothesis, that he is entitled to be relieved in that case. The defendant cannot by answer deny the plaintiff's title, and refuse to answer as to facts which may be useful in evidence in support of that title. 1 *Phillips*, 349, *Lancaster vs. Evors*. 3 *Madd. Ch. Rep.*, 71, *Mazzaredo vs. Maitland*. *Ibid.*, 432, *Unsworth vs. Woodcock*. 4 *Madd. Ch. Rep.*, 252, —— vs. *Harrison*. 10 *Beavan*, 225, *Jodrell vs. Slaney*. 3 *Md. Ch. Dec.*, 72, *Mitchell vs. Mitchell*. The point of the seventh exception is, that while the defendants admit they held collaterals on which they have received large sums, they do not state the particulars of those receipts, with reference to times and amounts, which discovery is essential to ascertain whether their account is correct or otherwise. There is an averment, that the dates of these receipts will appear by a certain paper, which paper is not in the record, but there is no averment that these receipts were *after* the execution. They admit receipts of *various* sums, but do not make out, as they should, an account of *every sum* with the day and date of its receipt. As to the *eighth* exception. The defendants were agents for sale of goods consigned to them by the complainant, and, as such,

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were bound to keep accounts. They are asked to render an account and to discover the original books of account, and entries containing any and every account whatsoever, relating to the sales of these goods. They say they have rendered accounts from time to time. They do not say they have no books containing such accounts as are called for, but only answer that "No account books were ever kept, in which the complainant has or ever had any interest or property," that "they have no such books as are supposed by the bill." Now it is insisted, that if the defendants kept the accounts relating to the goods of the complainant, in the books of account of their general dealings, they have thereby given to complainant such an interest in these books, as entitles us to call for their production. 3 *Merivale*, 43, *Freeman vs. Fairlie*. 1 *Cox*, 277, *Earl of Salisbury vs. Cecil*. 3 *Younge & Coll.*, 659, *Toulmin vs. Copeland*. 9 *Beavan*, 287, *Clarke vs. Tipping*. As factors, they were bound to keep books and to disclose them. They say they have returned honest and accurate accounts, and yet do not disclose books. They admit they have *account books*, and we are entitled to a description of those books in order to their inspection as to original entries. The other exceptions which were sustained, insist on the right of the complainant to full discovery of particulars of dates, prices, quantities and purchasers, of goods sold or otherwise disposed of, the answer admitting the sales and appropriations in the general. We were entitled to the names of the purchasers, so as to bring them up, and by their oaths to falsify the accounts if we could do so. The information to be given in answer to such questions, is such as the defendant can derive from his *books* and *agents*, not simply what is in his own *personal* knowledge. *Adams Eq.*, 12. 3 *Daniel's Ch. Pr.*, 2046 to 2048. Many of the exceptions which were overruled should have been sustained, and if this court is to answer the exceptions at all, it will review the decision below on these also.

4th. Upon the hypothesis, that the only subject for revision is the correctness of that part of the order appealed from which continues the injunction, it is insisted, that the merits of the

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discussion are on the bill, answer and testimony, taken in support of the allegations of the bill, and that the rule of judicature in such a case, is rightly stated in *Md. Ch. Pr.*, 86, viz., "that so much of the bill as is not denied by the answer is taken for true, and likewise so much of the answer as is responsive to the bill," and as a consequence, "if any equity is admitted or is not denied, or if any material allegation in the bill remains unanswered in any of its particulars, the injunction will be continued until the final hearing." As proof of the rule, it is submitted, that where the answer is evasive or unconnected, not meeting the averment in the bill, by a direct admission or denial, the charge is to be taken as confessed for the purpose of this hearing. 3 *Bland*, 132, 162, *Salmon vs. Clagett*. *Ibid.*, 445, *The Belona Company's Case*. 7 *Gill*, 196, *Briesch vs. McCauley*.

The case on the merits, in brief, is thus: The company manufactured cotton goods, and the appellants were its sales agents. The appellants being largely in advance and holding in their hands as collaterals, "Mason's notes," and "goods in store," required a judgment as further security. They wanted a judgment for the full amount of their advance. The company insisted on limiting the judgment to \$10,000. They say this sum was to be treated as a definitive adjustment and liquidation of so much of the debt. The company says, the judgment was to stand as a security for so much as might be ascertained to be due from one party to the other, and that the confession of judgment did not affect its rights to examine into the correctness of the account. And it is insisted:

1st. That the pleadings and evidence sustain the company's view of the transaction, and especial reliance is placed on the testimony of Bradenbaugh, and on the admissions three times made in the answer, that the judgment was accepted, with notice that George H. Williams, the most active corporator and agent, and attorney, in confessing the judgment, expressed his dissatisfaction with the accounts, and his purpose at a future day to examine into them. We do not ask to *destroy* the judgment, but say, that for all the purposes for which it was

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rendered, it is as valid now as it ever was; that it is a *collateral* and nothing more, and that the use now attempted to be made of it is against conscience and equity.

2nd. That as there are no exceptions to the sufficiency of the averments of the bill, and no appeal is taken from the order granting the injunction, and the time limited for an appeal from that order is passed, the company is entitled to the benefit of any equity which arises out of the merits of the case, as disclosed by the entire record. *Act of 1832, ch. 302, sec. 5.*

3rd. That the charges in the bill of classes of errors, and the averment that the company cannot be more specific without an examination of the agents' books, which is denied them, sufficiently answers the objection, that the bill does not affect to surcharge and falsify in particulars. *77 Law Lib., 97, Macnaghten's Select Cases.*

4th. That the objections of limitations, lapse of time, acquiescence and the like, are met by the averment, that the company has recently discovered the false and fraudulent conduct of the agents and of the accounts rendered. Such objections have place only after the discovery of the fraud. *11 Clark & Finnelly, 714, Charter vs. Trevelyan. 1 McN. & Gordon, 87, Alfrey vs. Alfrey. 6 Hare, 366, Wilson vs. Short. 9 Beaven, 287, Clarke vs. Tipping. 1 Johns. Ch. Rep., 550, Barrow, et al., vs. Rhinelander. 2 Jones & Latouche, 422, Murphy vs. O'Shea.*

5th. It is averred in the bill, that large amounts of goods consigned by the company to the agents, to be sold by them to others, have been returned as sold, when, in truth, they were secretly, without the knowledge and consent of the company, taken on private account of the agents, and by them subsequently sold at great profits; and the agents are required to render a full and particular account in detail, of the goods so taken and of the sales thereof subsequently made. It is admitted, that the goods consigned to be sold were taken by the agents to their private account; that these goods were returned as sold, and that they were subsequently sold by the agents at great profits, which have not been accounted for.

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But it is pretended, they were so taken to account with the privity and consent of another agent—the treasurer of the company—and therefore, the discovery sought of particulars is refused. Now it is insisted, that an agent for sale has no right to take goods consigned for sale to his private account, and if he will do so, in violation of his duty, he forfeits all his commissions, and must account for any profits subsequently realized. 1 *Starkie's Rep.*, 113, *White vs. Chapman*, in 2 *Eng. C. L. Rep.*, 319. 3 *Beavan*, 84, *Gillet vs. Pepper-corne*. 6 *Hare*, 366, *Wilson vs. Short*. 5 *Bligh.*, 165, *Rothschild vs. Brookman*. 2 *Ves. Jr.*, 317, *Massey vs. Davies*. 4 *How.*, 503, *Michoud vs. Girod*. 2 *Gill*, 99, *Brooke vs. Berry*. 3 *G. & J.*, 311, *Diffenderffer vs. Winder*. 12 *Pick.*, 332, *Dodge vs. Tileson*. That the fraud in the act is, in this case, aggravated by the misrepresentations on the face of the accounts; and that the case of the company being thus made out, all that is averred in regard to privity or consent on the part of the company, is matter in avoidance which the agents were bound to prove. 5 *Bligh.*, 201. It is denied that there is any proof of acquiescence or assent to these improper acts of the sales agents, and that George Williams, who is supposed to have given his consent to these frauds, had any authority to bind the company by such consent. They admit they took goods to their own account, but say it was sanctioned by the company's agent, which amounts to this, that *one agent* may commit a *fraud* provided he can get *another agent* of the same principal to sanction it. And it is further insisted, that the company is entitled to the discovery sought, to assist in the preparation of the case, and the refusal to give the discovery entitles the company to a continuance of the injunction.

6th. The appellee in like manner relies on the several specifications of fraudulent misconduct which are enumerated in the bill, insisting, that in the present state of the record they are virtually confessed, and especially in the confession, that "there may be instances in which, pending a limit," (on the prices at which the goods were sold,) "where persons were unwilling to purchase at so high a price as the limit, the goods were delivered upon the understanding that the same should

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be afterwards considered as sold at the then market price, when the limits should be taken off, or when the market price should attain the limit, whichever should first happen." And it is insisted, that on the present hearing, the admission, that such cases may have happened, is to be treated as a confession that they did happen, and that such conduct was grossly fraudulent. And it is further insisted, that the plea of *stated account* is of no avail where the answer admits fraudulent transactions.

1 *Story's Eq.*, sec. 523. *Story's Agency*, secs. 210 to 213.

7th. That the original entries by the agents in their general books of account of sales, or dispositions made by them of the company's goods consigned to them for sale, are entries to which the company have a right of access, and especially as it is confessed, that the accounts rendered are false in several respects, and especially in misrepresenting goods as sold, which are now admitted to have been taken by the agents on their own account; and that on the present hearing it ought to be assumed, that the books if produced will show every fact which it is alleged will be shown by them. See authorities already cited in discussing the *eighth exception*.

8th. That upon the hypothesis of the appellants, that the judgment was a definitive liquidation of indebtedness to the extent of \$10,000, it would not prevent an inquiry into the state of account with reference to any indebtedness beyond that sum, nor into the account of receipts and applications of the collaterals, nor the right of the company to apply the avails of the collaterals, beyond the residue of indebtedness correctly ascertained, in reduction of the payment.

9th. That the appellants having failed to render an account of collaterals, realized since the confession of the judgment, on this ground alone the injunction ought to be continued.

10th. That the confession, that the judgment was subject to credits at the time execution was issued, and that interest thereon had been paid up to the 31st of March 1853, for the whole sum recovered, entitles the company to a continuance of the injunction, until all matters in equity shall be adjusted.

2 *H. & J.*, 34, *Lynch vs. Colegate*.

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LE GRAND, C. J., delivered the opinion of this court.

The bill filed in this cause has several objects in view, which may be thus stated: first, to enjoin the execution of a judgment in favor of appellants, and against the appellee; second, to procure a full and accurate account, embracing items and dates, of the dealings between the parties, the appellants having been the factors or agents of the appellee, for the sale of goods manufactured by the latter. The bill, in substance, alleges that the judgment sought to be enjoined was confessed by the appellee, not as an acknowledgment, absolutely, of so much indebtedness, but merely as a security for any which might thereafter be ascertained to exist. It also charges the accounts rendered by the appellants to be incorrect; that sales were reported to have been made, and at rates, when none such were made, and at the rates stated; that its agents, the appellants, took, on frequent occasions, to their own account goods, and reported them as *bona fide* sales, to its great loss. It asks for a full account of the dealing of the parties, including certain specifications and details, so that the complainant, when furnished with such information, may be enabled to surcharge and falsify. On this bill the court granted the injunction as prayed. The defendants answered, and the complainant excepted to the answer, both on the ground of impertinency and insufficiency. Testimony was taken, and a motion to dissolve the injunction and the exceptions were heard together. The court continued the injunction, and sustained of complainant's exceptions to the sufficiency of the answer, those numbered in the record 7, 8, 9, 10, 11, 12 and 13. From this action of the court this appeal is taken.

A motion has been made to dismiss the appeal, because of the want of an answer. This motion is founded on the language of the acts of 1835, ch. 346 and 380, which provide that an appeal will not lie from an order granting, or from the refusal to dissolve an injunction, until the defendant has filed his answer, and on the case of *Richter & Wheat vs. Pue & Wife*, 9 G. & J., 475, which determines an insufficient answer to be no answer within the view of the acts of Assembly. It follows, therefore, that if the court below was right in hold-

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ing good the exceptions of the complainant, or any of them of material importance, then this appeal must be dismissed. Before alluding to the exceptions, we think it proper to say that we do not agree with the counsel for the appellee, that no appeal would lie until the court below should adjudge the sufficiency of the answer. It is for this court alone to determine when an appeal will lie. *Exers. of Oliver, vs. Palmer & Hamilton*, 11 G. & J., 137. *Thompson vs. McKim*, 6 H. & J., 302.

To confide the decision of this question to the court of original jurisdiction, would be, in many cases, to deny all review by the appellate tribunal. Besides, the language of the decree in the case of *Richter vs. Puse*, shows plainly that it was the judgment of this court, and not that of the court below, which determined the insufficiency of the answer. It says, that the defendants having "failed to file sufficient answers to the bill of complaint," &c. Not that the court below had so decided, but that this court so determined and adjudged, and, therefore, appeal dismissed.

It is a well settled principle of equity jurisprudence, that if a respondent submit to answer, he must answer fully; *Warfield vs. Gambrill*, 1 G. & J., 511; and that "the court expects from every one seeking relief, unreserved frankness; and he who evidently and purposely holds back something, cannot complain if he should find himself regarded with suspicion and distrust, and be refused that to which he may, in truth, be entitled, and under other appearances might have obtained." 3 *Bland*, 132. By the same authority we are assured that whatever it may be in the English courts, "it has long been the practice of this court (chancery) to hear and decide upon the motion to dissolve and the exceptions to the answer at the same time."

These citations are sufficient to show what are the questions before us, and the rules which are to decide them.

In the present condition of the record, it is impossible to state what, in fact, was the answer to the seventh exception. It refers to a paper marked X 4, as showing the dates and amounts of the receipts from collaterals in their hands. There

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is no such exhibit in the record, and, of course, this court cannot undertake to decide upon its statements. It may, or not, have furnished a full and complete answer to the exception. All we can do, is to declare that the complainant is entitled to full knowledge of the amount of collaterals in the hands of the defendants, and also what has been received from them, and, indeed, a correct and detailed statement of the condition of such securities. We must hold the exception to have been properly sustained. We are also of opinion that the eighth exception is well founded. The answer to it, to say the least of it, is ambiguous; it refers to books such as are supposed in the bill. It is the duty of the factor to keep books, in which shall be correctly entered the transactions on account of his principal, and the latter is entitled to a correct copy of the entries, including all memoranda connected therewith. The 9th, 10th, 11th, 12th and 13th exceptions were, in our judgment, sufficiently answered. The answers, in substance, declare that the accounts were true in every particular, "*and were fully examined, understood and approved;*" that it is now impossible for the defendants to give the names of the purchasers in every instance; that had the demand been made within a reasonable time, they might have been able to have furnished the information. We think the settlement of accounts, with full knowledge of all the items of which they were composed, without any intimation given that the names of the purchasers would ever be required, is a fact entitled to considerable weight, for although in a case of actual fraud during the life time of the parties, limitations will not bar, (4 *How.*, 561,) yet when parties with complete information adjust their accounts, it would be unreasonable to subject them, or either of them, at any considerable distance of time thereafter, to a demand for names which could have been readily furnished, if required, at the time of accounting, but which, in the lapse of time, if not absolutely impossible, it is very burdensome and expensive to obtain. The obligation of candor is reciprocal. If it were the intention ever to make such a demand, the defendants should have been notified of it at the date of some of the adjustments, or within a reasonable time thereafter. This view,

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of course, is based upon the supposition that the conduct of the defendants has been honest and faithful in all things; if, on the contrary, they deceived the complainant by false statements, and by the concealment of material facts, then it is competent to complainant to avail itself of every circumstance which will cast light upon the transactions of its factors.

The case involving large interests, and much time having already elapsed without any really practical result having been accomplished, and understanding it to be the wish of all parties, as announced at the bar, that when the case goes back, that it does so accompanied with the views of this court as to the principles upon which it should be ultimately decided, we will briefly indicate them for the government of the Superior Court.

**AS TO THE JUDGMENT.**—*Prima facie* it imports verity, and, as to the parties to it, is conclusive, unless mistake or fraud be shown, and the *onus* is on those who impeach it. A judgment is the highest exercise of the judicial power, and, as such, to be interfered with or questioned only with great delicacy and circumspection. Were this not so, our judicature, instead of being a guaranty of stability and certainty, would be worse than a farce; would be a snare and a trap to the confiding. The law regards it as the final adjustment of the matter in dispute, upon which the parties may confidently rely. If, as alleged in this case, the judgment was agreed and understood by the parties to it to be, not an ascertainment of so much *actual* indebtedness, but only as a *security* for so much as thereafter might be ascertained to be due, then, in such case, it would be a fraud on the part of the appellants to use it for a purpose different from that of the agreement, and a court of equity would enjoin them from doing so. 10 G. & J., 226. But to establish such a proposition in direct conflict with the legal import of the judgment, the evidence should be abundantly full and explicit; so full, indeed, as to leave no doubt on the mind of the court. Unless evidence of this character be adduced, the judgment should be regarded as unimpeached, and remain in full vigor.

In the final decision of this case, the law governing the re-

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lation of principal and factor, is to be applied to the dealings of the parties. What that law is—so far as this case is concerned—we shall, as concisely as may be, state.

Its paramount and vital principle is *good faith*; without it the relation of principal and agent cannot exist; and so sedulously is this principle guarded, that all departures from it are esteemed frauds upon the confidence bestowed. Almost any number of cases might be cited to support this declaration, but such a labor would be but an unprofitable employment of time, inasmuch as all that can be usefully noticed, has been in a very clear manner brought together by *Sugden*, in his work on *Vendors and Purchasers*, by *Justice Story*, in his commentaries on *Equity Jurisprudence*, and in the decisions of the Supreme Court of the United States. In these compilations we have, without unnecessary verbiage, the relative duties of principal and agent distinctly defined. There is no discordance between them; but, on the contrary, perfect harmony. In the case of *Brooke, et al., vs. Berry*, 2 *Gill*, 99, the Court of Appeals emphatically recognized and adopted the views of *Justice Story*, contained in his commentaries on *Equity Jurisprudence*, as stated in section 315. In the celebrated case of *Michoud, et al., vs. Girod, et al.*, 4 *How.*, S. C. Rep., 503, (a case elaborately argued by counsel, and fully considered in all its bearings by the court,) the views of *Sugden* are fully adopted; and he says, when speaking of agents and trustees other than those who are *only nominally so*, that they “are incapable of purchasing such property (that of their principal) themselves, except under the restraints which will be shortly mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying upon their integrity. The characters are inconsistent.” The Supreme Court, after fortifying this doctrine by the citation of a great number of cases, proceeds to announce as a consequence, that the law “prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account

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of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells." From this it follows that the appellants had not, according to the general principle, the right to purchase the goods of their principal intrusted to them for the purpose of sale to third parties. The exception to this general rule, or, as *Sugden* terms it, "restraint," is thus expressed; "We scarcely need add," say they, "that a purchase by a trustee of his *cestui que trust, sui juris*, provided it is deliberately agreed or understood between them that the relation shall be considered as dissolved, and there is a clear contract ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as trustee, will be sustained in a court of equity." This extract from the opinion of the court, embraces both its own and the opinion of Sir Edward Sugden. And our late Court of Appeals, in the case already referred to from 2 *Gill*, after regretting that the inhibition was not without limitation, say—quoting the language of Justice Story—"To deal validly with their principals in any cases, except where there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition," is not to be permitted.

According to these doctrines, if the appellants, without the knowledge and assent of their principal, purchased or took to their own account, goods entrusted to them for sale, or, with the knowledge and assent of their principal, purchased its goods, the principal not being fully and thoroughly advertised of every fact and circumstance in the possession of the agents, such sales are invalid. Whether there were any purchases made by the appellants unattended by these *indicia* of perfect good faith, is a proper subject of inquiry for the court to which this cause will be remanded. The record, as it now stands,

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discloses nothing positive on this head, although it does much in regard to the general course of trade, and from the ordinary turn of things, it is inferred by witnesses and counsel that such purchases as are unauthorized by law, were made. The answers of the appellants declare every thing was done with the full knowledge and approbation of the agent of the appellee. If this should turn out to be so, and that there was a free, full and frank disclosure of every circumstance connected with the transactions, and a total absence of all fraud and concealment, then, if the accounts between the parties be properly stated, we do not perceive how, under the decisions to which we have referred, such sales can be impeached in a court of equity. Whether the accounts are properly stated, is not for us to decide; that is more properly the business of a book-keeper or accountant; all we can do, is to point out the principles on which they should be stated. If the items composing the several accounts rendered, and the interest thereon, be arithmetically and properly averaged, then the result is precisely the same as though the interest had been computed separately on each item from its true date. This is a mathematical fact.

With these views we dismiss the appeal, the injunction remaining until further order of the court.

*Appeal dismissed.*

(Decided July 21st, 1858.)

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**CHARLES B. HANSON & WIFE, and WM. B. NELSON & WIFE, vs. JOHN T. WORTHINGTON and others.**

A testator bequeathed \$10,000 to a trustee, who was also one of his executors, to be put at interest, or invested in stocks, and to be held *in trust*, to apply the income to the support of the testator's wife during *her life*, and, *after her death*, he gave and bequeathed said sum and the securities in which it may have been invested, to the children of his daughter Mary. He further directed that the power of thus putting at interest, and in-

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vesting, and of selling and reinvesting, as often as the trustee deemed expedient, should be a continuing power during the requisite continuance of the trust. The wife renounced the provisions of this will. HELD:

1st. That by such renunciation the rights and interests of the legatees in remainder were not affected; the estate in remainder was vested in such legatees, and the renunciation only struck from the will the bequest to the wife.

2nd. The trust thus created and vested in the trustee, was not limited to the life of the wife, but was a continuing, subsisting trust after her death for the parties in remainder, and the trustee could only be discharged from his obligation by payment of the fund to them.

3rd. The executor and trustee having, under a mistake as to the effect of this renunciation, settled up the estate, and wrongfully paid this legacy to the residuary legatees, both he and they are responsible to the cestuis que trust therefor, the former primarily, and the latter ultimately.

4th. Limitation is no bar to this claim, and, under the circumstances of the case, there has been no such lapse of time, or laches and delay in making the claim, nor acquiescence and concurrence in the settlement of the estate and distribution of the fund, as will bar the complainants of their equitable relief.

5th. The parties who wrongfully received the legacy, being bound to refund the same, having taken it subject to the trust, and they, as well as the trustee, being alive and in court, upon a bill filed by the cestuis que trust against all of them, the decree, while providing for payment to the complainants, will also give the trustee relief over against his co-defendants.

6th. The complainants are entitled to interest on the principal sum due them for this legacy, from the time the same was wrongfully paid to the residuary legatees, but several payments having been made through a period of years, it should be counted, under the circumstances of the case, only from the date of the last payment.

Where a trust is created by a will in a party who is also executor, the pro-bate of the will, and taking out letters testamentary thereon, by such party, are sufficient evidence of the acceptance of the trust.

Where a party has once fixed himself by any means with the acceptance of a trust, he cannot afterwards, by disclaimer, renounce or repudiate the duties and responsibilities of the office.

Where the subject of a trust is personal estate, the whole legal interest is in general vested in the trustee by a gift, without any words of limitation, and will continue in him till divested by a legal transfer or assignment.

Where a party is sole executor, and also a trustee, the fund will, by operation of law, be considered in his hands as trustee, after the time limited for the settlement of the estate, and where there are two executors, and one dies, the same principle applies to the survivor.

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A *release* executed by a female infant to her guardian, after attaining the age of eighteen, is, if *bona fide* made, a good acquittance to the guardian, but cannot discharge from liability a third party holding funds as her trustee, which were never paid or transferred to the guardian.

A release discharging an *executor* from the sums due to the parties releasing, as *residuary legatees*, cannot operate to discharge him from his liability as trustee for a *specific legacy* bequeathed to him *in trust* for the benefit of the same parties executing the release.

What lapse of time and laches are sufficient to bar the right of parties to recover on a claim *purely equitable*, depends upon the particular facts and circumstances of each case.

Proceedings of an *executor* in the orphans court, in reference to the distribution of the estate, made *ex parte*, there being no appointment of a meeting of claimants, as provided by the testamentary act, and no order of the court directing the distribution, are not *conclusive* upon any party affected thereby.

Where a party equally entitled with the complainants to a legacy claimed by the bill, is made a defendant, and by his answer disclaims any claim for such legacy, the bill as to him should be dismissed.

Where two of several defendants, in their answers, claim rights and relief as against their co-defendants, in case the complainants should be entitled to relief, and the decree of the court below *dismissed* the bill with costs, they not being aggrieved by such decree, cannot *appeal* therefrom; an appeal on their part is not necessary in order to save their rights.

#### APPEALS from the Circuit Court for Baltimore city.

The two appeals in this case were taken, the one by the complainants, Hanson and wife, and Nelson and wife, and the other by two of the defendants, John T. Worthington and Samuel Worthington, from a *pro forma* decree of the court below, (KREBS, J.,) dismissing the bill filed by the complainants. The claim set up by the bill, the defences thereto relied on in the answers, and the facts, are all fully stated in the opinion of this court.

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*Geo. W. Dobbin* and *J. N. Steele* for the complainants:

1st. The bequest of \$10,000, in the will of the testator, to John T. Worthington, *in trust*, for the maintenance and sup-

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port of the testator's widow, during her life, and after her death to the children of his daughter Mary, vested in remainder in said children upon the death of the testator, and became payable to them on the death of the widow, and the *renunciation* of this bequest by the widow, in no wise affected the interest of the legatees in remainder.<sup>1</sup> All that fell into the residuum by this renunciation, and all that the widow gave up thereby, was the *income* with which the trustee was to maintain the widow *durante vita*, and the right of such maintenance. 1 *Gill*, 403, *Darrington vs. Rogers*.

2nd. There was no renunciation by John T. Worthington of the trust created by this bequest, and the funds having come into his hands, he is bound to account to the legatees in remainder therefor, with interest thereon from the date of the death of the widow. On this point it is objected, *first*, that there was no trust for the legatees in remainder. But the trust clearly extended to them, and the trustee had duties to perform towards them; the subject of the trust was personal property, which he was bound to *pay over* to the parties entitled, upon the death of the widow. The will imposes two classes of duties upon the trustee in reference to this bequest, *one* in regard to the *income*, and the other as to the *principal*; the former he was to apply to the maintenance of the widow during the life, the latter he was to pay over to the legatees in remainder upon the death of the widow; and by the express terms of the will, his powers and duties as such trustee were to *continue* during the requisite continuance of the trust. Again, it is said he did not *accept* this trust, but *renounced* and *repudiated* it. But, in point of fact and *law*, he did *accept*. He came forward and *proved the will*, and *took out letters* under it, and where a party does this, he is bound to execute the will, and *accepts the trusts thereof*. *Hill on Trustees*, 314. How has he *renounced* or *repudiated* it? The law requires plain, strong and unequivocal proof of his renunciation before the trustee can divest himself of such a trust. 4 *H. & J.*, 430, *Fishwick vs. Sewell*. Now it is not pretended that this trustee ever *expressly renounced* this trust, or that he ever said a word repudiating it, but the renunciation is sought to be *inferred* from certain acts,

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or rather from his *non-action*. The testator died in 1834, and the executor's 1st and 2nd administration accounts were passed in 1837, and he now says, that because in these accounts no notice was taken of this legacy, he never was trustee of it; that is, the *non-performance* and *non-discharge* of his duties as trustee, is proof that he never was trustee, or, if he ever was, that he renounced the trust. This is to set up a *breach of trust* as a *disclaimer* of the trust. But the inventory, the administration accounts, and the various distributions show that for the whole time he was in *receipt* of the property in the character in which the will cast it upon him. The estate remained open, and is in fact still open, no *final account* by that name having yet been passed. It is also clear law, that where a trustee has once accepted a trust, he cannot afterwards, by disclaimer, renounce or repudiate the duties and responsibilities of the office. *Hill*, 219. Again, it is well settled that where a party holds the double capacity of executor and trustee, the fund will be considered in his hands as trustee after the time limited by law for the settlement of the estate, nor is this principle or the responsibility of this trustee and executor to the *cestui que trust* at all varied by the fact that there were here two executors, for each is liable to them for the full extent of the funds he receives. 1 *Md. Rep.*, 190, *Beall vs. Hilliard*. The trustee, therefore, having accepted the trust, he could only discharge himself of it by paying over the money to these legatees in remainder, and his failure to do so, is a breach of trust for which he is *primarily liable*, and failing this liability, the residuary legatees, to whom the fund has been *wrongfully paid*, are *responsible* to these *cestuis que trust*, and interest should be calculated from the time the fund became due and payable to them. *Hill*, 173.

3rd. There have been no such *laches*, *acquiescence* or *concurrence* in the acts of the trustee and executor, on the part of the complainants, as will discharge him from liability. The acts of Worthington, as *executor*, in making these various distributions, do not protect him, for he settled up the estate in the orphans court without *plenary proceedings*, as provided for in the act of 1798, ch. 101, sub-ch. 14, sec. 12, and in doing

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so, he merely acted *in pais*, and at his peril. *4 Md. Ch. Dec.*, 425, *Conner vs. Ogle*. As trustee, nothing but *gross laches* on the part of the *cestuis que trust* will protect him. A party standing by and ignorant of his title, and acting under a plain and acknowledged mistake of his legal rights, will not forfeit those rights in consequence of such misapprehension. *6 H. & J.*, 525, 526, *Lammot vs. Bowly*. But we need not go to this extent, for there has been no acquiescence on our part in any act of the executor or trustee, inconsistent with our claim to this legacy. The *release* to the executor is only for the *distributive* shares of the *residue*, and purports to be given by the parties to it as *residuary legatees*. It only acknowledges the receipt of such funds *as far as they have come to the hands of the executer*, and been *accounted for* by him. What information did this give us of the legacy, or that the executor had not *retained* for it? It is perfectly consistent with this release that there may have been other assets to be received and accounted for, out of which this legacy could have been paid, or that the executor had retained therefor. Nor are the releases to the guardian of any more avail. They only purport to release the guardian for what he *has received*, whereas this is a claim for money which never came to his hands. Besides, at the time these releases were signed, the complainant legatees were minors, and have since been *married women*, and under all the circumstances of the case, it is confidently insisted there have been no such *laches, acquiescence or lapse of time* as will prevent them from recovering this claim from the trustee and the parties to whom it has been wrongfully paid, all of whom are now alive and in court, with this very fund now in their possession.

4th. That the statute of *limitations* does not apply to this case, the trust being enforceable *only in equity*. It was a subsisting, continuing, active trust, over which a court of law had no *concurrent jurisdiction*, but which could only be enforced in equity, and to such a case the statute of limitations has no application. *1 Story's Eq.*, secs. 539, 540, 129. *3 Gill*, 159, *Dugan vs. Gittings*. *8 Gill*, 395, *Barnes vs. Compton*. *3 Md. Rep.*, 366, *Hertle & Wife, vs. McDonald*. *4 Md. Rep.*, 362,

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*Young vs. Mackall.* 5 Md. Rep., 334, *Greenwood vs. Greenwood.* 6 Md. Rep., 319, *McDowell vs. Goldsmith.* 6 Md. Rep., 418, *Bowie vs. Stonestreet.* 8 Md. Rep., 87, *Teackle, et al., vs. Gibson.* 3 Sumner, 476, *Baker vs. Whiting.* 2 Hawks, 486, *Tate vs. Greenlee.* Ibid., 490, *Falls vs. Torrance.* 1 Dessaus, 150, *Lindsay vs. Lindsay.* 10 Leigh, 285, *Baker vs. Morris.* 3 How., 411, *Oliver vs. Piatt.* 1 Peere Wms., 554, *Farrington vs. Knightly.*

*John V. L. McMahon* for the Worthingtons, argued:

1st. That John T. H. Worthington, is not responsible to the complainants as trustee or legatee in trust of this bequest of \$10,000, because the legacy and the trusts imposed by it were never accepted by him, but were, on the contrary, disclaimed by him, by all his conduct and acts in the administration of the estate. There is not a single act or word of this trustee shown in the record, or in his administration of this estate in acceptance of this trust, and it is clear, that the duties and liabilities of a trustee cannot be imposed upon any one without his assent or against his will. 7 G. & J., 164, 165, *Maccubbin vs. Cromwell.* No express renunciation of the trust is necessary; there must be an acceptance of the trust, especially if the bequest be of personality. There must be some assent or some act done in the capacity of trustee, before the law will make the transfer to him in that capacity, even where the *same party* is executor and trustee. (16 Alabama, 14, 15, *Perkins vs. Moore.*) But here there were *two joint executors* and but *one* of them is made trustee by the will, and in such a case the principle of a transfer by operation of law does not apply. 2 G. & J., 220, *Watkins vs. The State.* Where an executor is also legatee, it is necessary to the vesting of the legacy in him, that he should give his *assent*, either express or implied from his *doing some act* in the *character of legatee rather than that of executor;* it is not enough that the act is equally applicable to *both* characters. 2 Wms. on Excrs., 849, 850, (Ed. of 1832.) 7 Taunt., 217, *Doe vs. Sturges*, in 2 Eng. C. L. Rep., 80, 81. A renunciation of a trust may be by parol, and at any length of time,

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or by conduct inconsistent with the character of trustee. *Hill on Trustee*, 221, 226.

2nd. That by the renunciation of this bequest by the widow, all the trusts for her benefit created therein, became wholly inoperative and void, and thereby all the rights and duties of Worthington, as *trustee* under the bequest, wholly ceased, and there remained only the direct bequest over of the sum of \$10,000, after the death of the widow, to the children of the testator's daughter Mary. That after this renunciation, Worthington had not the right, nor if he had, was he under any obligation, as *trustee for those in remainder*, to claim and hold the bequest only for the purpose of handing it over to the legatees in remainder, at the death of the widow. And that after this renunciation, by force of which the bequest resulted to the estate during her life as undisposed of, the legatees in remainder, at her death, became entitled to it, (if at all,) by a *direct* and *immediate* devise, without the intervention of a trustee, and were entitled on their own application, to claim or have secured to themselves at her death the payment of the same, and Worthington is not responsible to them for not having claimed or secured the legacy for them. It is well settled, that the estate to a trustee is limited by that to the *cestuis que trust*, that he takes no greater estate than the purposes of the trust require. The only purpose of this trust was to create a trust for the life of the widow; the moment she died the *trust ceased*. The language of the devise clearly shows this to have been the sole object and purpose of the testator. After the widow's death the money was to be handed over by the executors to the legatees in remainder, as the *testator's property*, and they were to receive it by virtue of a *direct* and *immediate* devise, without the intervention of a trustee. In support of these views see *Hill on Trustees*, 239. 1 *Barn. & Cress.*, 336, *Player vs. Nicholls*, in 8 *Eng. C. L. Rep.*, 94; 60 *Eng. C. L. Rep.*, 669, *Muller vs. Claridge*; 4 *Mees. & Wels.*, 428, *Barker vs. Greenwood*.

3rd. That the time, manner and circumstances of the administration and distribution of the estate, down to its *final* distribution amongst the complainants and others as residuary

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legatees, and the lapse of time before making this claim, show not only such acquiescence, but also such concurrence on the part of the complainants, in the final distribution without deduction of this bequest, and with full knowledge or means of knowledge that it had not been paid or retained for, and also such delay and *laches* in the assertion of the claim, until long after the death of the widow, and the final distribution, as are of themselves sufficient to bar the complainants' title to relief against John T. H. Worthington, if they ever had any, especially when coupled with the facts of the *release to him* and his co-executor by the husbands of the female complainants, and also of the wives and legatees after their arrival at age, to their guardian and father, and after his release to the executors. And neither is Worthington, as *surviving executor*, responsible to the complainants for their share in remainder of this bequest, because of his failure to retain for the same; for after the widow's renunciation, it was the right and duty of the legatees in remainder or their legal representatives, to claim or apply for the retainer of this legacy, and being guilty of *laches* in not claiming the bequest or the retainer for it, when they had full knowledge of it, and that it had not been paid or retained for, they cannot charge the executors because of their failure to retain for it. After the death of the widow, in 1838, this legacy was payable immediately to the legatees in remainder, and, after it became so payable, the executors finally distributed to the complainants or their legal representatives and the other residuary legatees, assets to more than the amount of this bequest without any claim made by them thereto, or any pretence of objection to the distribution without deducting the legacy, and received from the complainants or their representatives the releases above stated, whereby and by the acquiescence, concurrence and *laches* of the complainants before stated, the executors were discharged from liability to them, if there ever was any. Again, the estate was finally distributed in the lifetime of Johns and by *both* executors, and the breach of duty, if any, was by both, and to any claim for relief on that ground, the legal representatives of the deceased co-executor are proper and necessary parties.

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The executor, in dealing with this estate, was acting honestly, innocently and as much to his own prejudice as that of the complainants, for he himself was one of the legatees in remainder of this bequest. If there was a mistake he was helped on in it by the complainants, and there is an *equitable plene administravit* made with their knowledge and consent. If a party to whom a legacy is given *says* to the executor, "I don't mean to claim it," this is an *estoppel*, and he cannot afterwards claim it, or induce the executor to administer the assets upon the footing that no such claim will be asserted, this is an *estoppel*, and the claim cannot be afterwards asserted. 1 *Ves. Jr.*, 172, *Clinton vs. Hooper*. • *Bell on Property*, 195, in 67 *Law Lib.*, 143. *Acts and conduct* may as strongly declare this to the executor, and be as much evidence of a disclaimer as *words*. It must be assumed, that all these parties knew all their rights, the will, their rights under it, the administration and distribution accounts and releases in the orphans court; for outside parties even are bound to know what the *public records* will disclose. 5 *Md. Rep.*, 231, *Miller & Mayhew vs. Williamson*, and same case in the court of chancery in 2 *Md. Ch. Dec.* 102. 1 *Bailey's Eq. Rep.*, 277, *Stephenson vs. Axson, et al.* But here these complainants came in and settled under these accounts in the orphans court, the proper *distributing forum*, and they knew, therefore, that the estate was being distributed in disregard of their rights to this legacy, and yet assented to such distribution.

*Acquiescence* alone is sufficient for this case. The complainants were bound to know what the law is, and whenever a party knows his rights, and stands by and sees another dealing with the property in a manner repudiative of his rights, and does not assert them, he is *estopped* from ever afterwards asserting his rights to such property. 7 *Simons*, 1, *Govett vs. Richmond*, in 9 *Cond. Eng. Ch. Rep.*, 449. 2 *Ves. Jr.*, 92, 93, *Hercy vs. Dinwoody*. 10 *Md. Rep.*, 302, 317, *Funk vs. Newcomer*. Even *forbearance* to make the demand affords a presumption, either that the claimant is conscious it was satisfied or *intended* to relinquish it. 2 *Ves., Jr.*, 583, *Pickering vs. Lord Stamford*. In *Stroud vs. Stroud*, 49

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*Eng. C. L. Rep.*, 416, a party entitled to a legacy had a claim against the testator, which he concealed until after he received the legacy from the executor, and *plene administravit* was held a bar to such claim. These were all cases of *outside acquiescence*; here we are dealing with the proceedings of the proper *distributing forum*, and with *parties to such proceedings*, with *full notice thereof*, but have neglected to prosecute their claims. In such a case equity can afford them no relief. 1 *Keen*, 392, *Sawyer vs. Birchmore*, in 15 *Cond. Eng. Ch. Rep.*, 399, 401. 17 *How.*, 255, 256, *Williams vs. Gibbes*.

But this is also a case of *concurrence* in proceedings in the proper distributing court. As parties, the complainants are forever concluded; a decree of distribution would forever have concluded them from setting up any claim *inconsistent* with that *distribution*. The orphans court has as ample powers as a court of chancery, to adjudicate upon all claims between distributees, legatees, and administrators and executors. It is a court peculiarly constituted for the distribution of assets, and a *general bill* for distribution cannot be filed in chancery because it would interfere with the jurisdiction of the orphans court. Where an executor and legatee honestly misconstrue the will, and have a settlement in full based on such misconstruction, the settlement will not be opened merely because of such mistake. 4 *Richardson's Eq. Rep.*, 349, *Keitt vs Andrews*. If a *cestui que trust*, being *sui juris*, participates in, or consents to, or after full knowledge acquiesces in an act of the trustee, amounting to a breach of trust, it amounts to a *waiver*, he cannot afterwards complain. *Adams Eq.*, 62, in 68 *Law Lib.*, 93, 94. *Hill on Trustees*, (1 Am. Ed.,) 525, 526, 527. 5 *Gill*, 505, *Hall vs. United States Ins. Co.* The complainants here acquiesced, concurred and participated in an act on the part of the trustee and executor, which *disturbed the basis of distribution* according to the claim now presented, and they are thus clearly brought within the principle above stated. *Lewin on Trusts*, 639, in 24 *Law Lib.*, 325.

Does *infancy* make any difference in this case? The com-

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plainants do not allege in their bills, any excuse by which they can be taken out of the case of adults, neither mistake, fraud, infancy or any thing else. But suppose they had alleged infancy, this defence could not avail them, and was completely waived by what subsequently took place. The guardian is constituted the peculiar custodian of the infant's rights, and when he comes forward and deals with an executor and compromises the rights of his ward, the infant is bound, so far as the executor is concerned, and must look to the guardian's bond for redress. The executor is authorised to look to the guardian as the representative of the infant. But when these infants came of age they released the guardian, with full knowledge that this legacy had not been paid, and this release is binding on them. 5 *Gill*, 29, *Fbrbes vs. Fbrbes*.

Again *laches* and *lapse of time* are a full bar to this whole claim. Many of the cases already cited are applicable to this point. The question is, at what time parties must come in to be relieved from the equitable bar, and this depends upon the peculiar circumstances of each case. In 4 *Richardson's Eq. Rep.*, 349, a case already cited, and one very similar to the present, it was said, that parties desirous of opening a settlement on the ground of errors or mistakes, must *make haste* in their application to the court. In 1 *Bailey's Eq. Rep.*, 197, 198, *Moore vs. Porcher*, it was held, that an executor who makes a *general distribution* of the estate, will be protected after the *lapse of four years*; if he makes a full and fair distribution he no longer sustains the character of executor, but the trust is discharged. Again, the parties must come in at such a time as that the court can do full and equal justice to all parties. 13 *Ohio Rep.*, 585, *Ludlow vs. Cooper*. If the overpaid legatees should be held not to be liable by reason of the *laches* of these complainants, then clearly the executor ought to be released. The plea of *laches* and *lapse of time* is as effectual as the plea of limitations, and they are analogously applied in equity. 2 *Story's Eq.*, secs. 1520, 1520 (a,) and *notes*. 30 *Miss. Rep.*, 320 to 332, *Young vs. Cook*. 11 *B. Monroe*, 161, *Wickliffe vs. City of Lexington*. The court itself, in its own discretion, may refuse to grant relief

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after the limited period, even though the statute is not pleaded and the bill is not demurred to. *Lewin on Trusts*, 617, in *24 Law Lib.*, 313. *Hill on Trustees*, 169, note. After *disclaimer* of the trust limitations will begin to run. These parties had a remedy at law; they could have sued in the orphans court, and they could have sued at law on the *executors' bond*. The remedy was at least *concurrent*, and in such case equity will, in *obedience* to the statute, apply the statutory bar.

4th. That in any view of the case, the court, having now before it, as parties to the case, under the supplemental bill and answer, the four residuary legatees who were overpaid in the distribution of the estate to the prejudice of these complainants, and the two Worthingtons, who were exclusively entitled to this bequest of \$10,000, ought, in relief of the executor and trustee to give the complainants relief, if any, by *direct decree* against such overpaid residuary legatees. That he is entitled to such relief in this case and on this bill, as against his co-defendants, is clearly settled by the case of *Gibson vs. McCormick*, 10 *G. & J.*, 101. The court has power to *mould the decree*, so as to do complete justice between the parties, (5 *Gill*, 355, *Farmers & Mechanics Bank vs. Wayman & Stockett*,) and will decree immediate payment from those who are ultimately bound. 5 *Cranch*, 330, *Riddle vs. Mandeville*. 1 *Bailey's Eq. Rep.*, 277, 278, *Stephenson vs. Axson, et al.* *Lewin on Trusts*, 635 to 639, in *24 Law Lib.*, 323, 324. That these co-defendants are liable if the complainants have any claim, is clear, for by the distribution of the residue, without deducting this bequest of \$10,000, they have by the admissions of their own answers, received more than they ought to the amount of \$5000, or one-half thereof, and they received this with full knowledge of this bequest, and that it had not been paid as is fully shown by the will and the executors' accounts. These co-defendants are, therefore, each respectively and severally liable to the legatees in remainder, for the amounts they respectively received in the distribution of this residue, over and beyond what they were entitled to in the proper distribution of it. A devise of *residue*, is of what remains after *debts* and *legacies* are paid, and when a

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party takes this before the legacies are paid, he takes what the will does not give him, and receives it as trustee for those entitled, and must refund. 1 *McCord's Ch. Rep.*, 389, *McCants vs. Bee*. 2 *Johns. Ch. Rep.*, 626, 627, *Lupton vs. Lupton*. 17 *Mass.*, 384, *Walker vs. Hill*. 2 *Southard*, 424, *Harris vs. White*. 2 *Peere Wms.*, 144, *Norton vs. Turvill*.

5th. As to the *quantum* of recovery, if at all entitled. That by the distribution of the *residue* without deducting the \$10,000, the complainants each in fact received one-eighth of that amount, over and beyond what they were entitled to, or would have received if this legacy had been taken out of the estate, whilst they were each entitled to one-fourth of the \$10,000, under the bequest, and they are therefore entitled only to one-eighth of that sum, as the amount necessary to correct such erroneous distribution and restore to them what they lost by it, and that *without interest*, at least until the filing of their bill, because of the non-claim, acquiescence, concurrence and *laches* already referred to. 12 *Ves.*, 386, *Bruere vs. Pemberton*. 7 *Ves.*, 546, *Petticard vs. Prescott*. *Hill on Trustees*, 524.

As to the *appeal by the Worthingtons*. If the case made by the complainants entitles them to relief, then these appellants insist, as has already been argued, that they also and especially Samuel Worthington, although defendants, are yet as two of the legatees in remainder, entitled to like equitable relief in respect of their shares of this bequest against their co-defendants, made such by the supplemental bill of the complainants, and this appeal is taken to guard against the possible assumption, that by their failure to appeal this right would be lost.

*S. T. Wallis* for the other defendants, argued:

1st. That the *second* point on the part of J. T. H. Worthington, was well taken, and ought to dispose of the relief sought by the bill as against these defendants also, and in addition to the authorities there relied on, see 1 *Bradford*, 5, *Paff vs. Kinney*; 8 *Md. Rep.*, 230, *McClellan vs. Kennedy*; 7 *Gill*, 366, *Richards & Wife, vs. Swan*.

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2nd. That the plea of limitations, pleaded by these defendants, strictly considered, apart from the question of *laches* in equity, is a bar to the relief prayed in the bill, even if it were otherwise proper to be granted. 10 *Texas Rep.*, 246, *Tinnen vs. Mebane*. 2 *Wms. on Excrs.*, 1722. 1 *H. & G.*, 265, *Murphy vs. Barron*. 3 *G. & J.*, 12, *McCormick vs. Gibson*. *Ibid.*, 374, *Penn vs. Flack, et al.* *Ibid.*, 395, *Green vs. Johnson*. 10 *G. & J.*, 217, *Tiernan vs. Rescaniere*. 1 *Gill*, 234, *Berry vs. Pierson*. 3 *Gill*, 161, 162, *Dugan vs. Gittings*. 2 *Md. Ch. Dec.*, 390, *McDowell vs. Goldsmith*, and same case in 6 *Md. Rep.*, 319. 3 *Md. Rep.*, 366, *Hertle & Wife, vs. Schwartze*. 7 *Johns. Ch. Rep.*, 120, 124, *Kane vs. Bloodgood*.

3rd. If John T. H. Worthington is to be treated as *trustee*, it is clear he has no remedy over against these defendants, for there is no *privily* between him and them in this character; it is a matter between the trustee and his *cestuis que trust*. It is only when he is treated as *executor* that a *privily* can be made out between him and these defendants. But even if he be liable as *executor*, to the complainants, he has no right to restitution from these defendants, having made the distribution in question voluntarily, with full knowledge of fact and law. 1 *Gill*, 1, *Stevenson vs. Reigart*. 4 *Gill*, 425, *Mayor & C. C. of Balti. vs. Lefferman*. 5 *Gill*, 244, *Morris vs. Mayor & C. C. of Balti.* 5 *Md. Rep.*, 219, *Miller & Mayhew, vs. Williamson*. 2 *Ves.*, *Sen.*, 194, *Orr vs. Kaines*. 2 *Vernon*, 205, *Newman vs. Barton*. 1 *Keen*, 391, *Sawyer vs. Birchmore*, and same case in 2 *Myrne & Craig*, 611. 2 *Jac. & Walk.*, 263, *Goodman vs. Sayers*. 8 *Beavan*, 243, *Cattell vs. Simons*. 2 *Fbnb. Eq.*, Part 1, ch. 2, sec. 5. 2 *Wms. Excrs.*, 1244, 1246. 1 *Story's Eq.*, sec. 92, note 4.

4th. That even if, as *executor*, being liable to the complainants, he might otherwise have had his remedy over against these defendants, he has no such remedy under the circumstances of this case, and especially under the plea of limitations by them severally pleaded.

BARTOL, J., delivered the opinion of this court.

The claim for relief of the complainants, Hanson and wife, and Nelson and wife, arises under the following clause of the

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will of John Tolley Worthington: "I give and bequeath to my grandson, John Tolley Worthington, the sum of ten thousand dollars, to be by him put out at interest on real or personal security, or invested in bank stock, or in stock of the United States, or of the State of Maryland, to be by him held in trust for the following uses, intents and purposes, to wit: in trust to apply the dividends, interest, issues and profits arising therefrom, during the life time of my wife, Polly Worthington, to the maintenance and support of my said wife, and if any surplus of such dividends, interest and profits should remain, over and above the maintenance and support of my said wife, then I give and bequeath the said sum to my said grandson, John Tolley Worthington; and from and after the death of my said wife, then I give and bequeath the said sum of ten thousand dollars, and the stock and securities in which the same may have been invested or placed, to be equally divided between the children of my daughter Mary, living at the time of the death of my said wife, and the then living descendants of my said daughter Mary, such descendants not taking *per capita*, but *per stirpes*; that is, the said descendants of a deceased child to take what their deceased parent, if living, would have been entitled to."

The testator having given other ten thousand dollars to Richard Johns, in trust, for certain purposes, directs as follows: "*Item.*—I hereby will and direct that the power of putting out at interest and investing in stock the aforesaid two sums of ten thousand dollars, mentioned in the two last preceding clauses of this my will, shall be a continuing power during the requisite continuance of the trust, and that my grandson, John Tolley Worthington, and my son-in-law, Richard Johns, may, as often as they shall see fit so to do, severally collect the money by them put out at interest, and sell the stock by them purchased as aforesaid, and again, and as often as they deem it expedient so to do, put out the same at interest, or invest in stock as aforesaid."

By a codicil to his will, the testator declares his will and intention to be, that the said provision for his wife shall be "in lieu and bar of all her right, and thirds, and dower."

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The testator died in 1834, the will and codicils were duly admitted to probate on the 16th day of September of that year, and on the 3rd day of October, in the same year, letters testamentary were duly granted thereon to John Tolley Worthington, the grandson, and Richard Johns, they being the executors named in the will. On the 26th day of September 1834, Polly Worthington, the widow, filed her renunciation of the bequest made in her behalf, and elected to take her dower and legal share of the estate. She died in the year 1838, and at the time of her death, the children of the testator's daughter Mary, then living, were the complainants, Anna Maria Hanson and Comfort M. Nelson, and the said John Tolley Worthington, the trustee and executor, and Samuel Worthington, who were the only descendants of the said testator's daughter Mary.

The executors proceeded to administer the assets, returned an inventory on the 25th day of October 1834, and passed several administration accounts, of which the 1st was passed on the 11th day of January 1837, the 2nd on the same day, the 3rd on the 14th day of February 1839, the 4th on the 31st day of December 1839, and the 5th and last on the 12th day of May 1846. By those accounts it appears that the whole personal assets of the deceased which came to the hands of said executors, was applied to the payment of debts, the expenses of administration, and the payment of legacies under the will, *other than the legacy of ten thousand dollars* first above referred to, and the surplus or residue of the assets was distributed and paid to the residuary legatees under the will, in the same manner as if the said legacy of \$10,000 had not been made.

The residuary legatees named in the will were the testator's eight grand-children, viz: John Tolley Worthington, Anna Maria Worthington, Comfort Worthington, Samuel Worthington, Polly Worthington Johns, John Tolley Johns, Richard Johns, and Sarah Weems Johns, two of whom, Anna Maria and Comfort, are complainants in this case.

By the 2nd administration account, passed on the 11th of January 1837, it appears there was distributed and paid to the

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eight residuary legatees \$4700 each. This sum for each of the complainants, Anna Maria and Comfort, was paid to their guardian, they being then minors; the receipts of the guardian show that he received for each of them as follows: in May 1835, \$1500; in October 1835, \$2700; and in July 1836, \$500.

By the 3rd account, passed the 14th of February 1839, there was distributed and paid to each of said residuary legatees \$950.96, which, by the several receipts exhibited, appears to have been paid as follows: in January 1837, \$200; in June 1837, \$237; in September 1837, \$113.96; and in October 1838, \$400.

By the 4th account, passed the 31st of December 1844, the executors are allowed for \$700 paid to each of the residuary legatees, the shares of the complainants being paid to their respective husbands.

By the 5th and last account, passed in May 1846, the executors were allowed for \$36.53 $\frac{1}{2}$ , amount paid to each residuary legatee, the same appearing to be a distribution of the whole residue of the assets among the residuary legatees, who executed the following release:

"Know all men by these presents, that we, John T. Worthington, John T. H. Worthington, guardian of Samuel Worthington, Richard Johns, Jr., John T. Johns, R. Horace Love, who intermarried with Polly Worthington Johns, Thomas H. Hodges, who intermarried with Sarah W. Johns, Charles G. Hanson, who intermarried with Anne M. Worthington, and William B. Nelson, who intermarried with Comfort Worthington, all grand-children and residuary legatees of John T. Worthington, late of Baltimore county, deceased, do hereby severally acknowledge, each of us, to have received of John T. Worthington and Richard Johns, the executors of said deceased, the sum of (\$36.53 $\frac{1}{2}$ ) thirty-six dollars and fifty-three and a half cents, making, together, the sum of two hundred and ninety-two dollars and twenty-eight cents, and being in full of our respective proportions of the personal estate of the said deceased, as far as the same has come to the hands of the said executors, and accounted for by them with the orphans

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court for Baltimore county; and in consideration thereof, we do hereby release, acquit, exonerate and discharge the said John T. Worthington and Richard Johns, executors as aforesaid, their heirs executors and administrators, of and from all and every action, suit, claim or demand which could or might possibly be brought, exhibited or prosecuted against them, or any of them, for or on account of our said proportions, or the above mentioned sum or sums of money, or the payment thereof, hereby declaring ourselves fully satisfied, contented and paid, as above specified. Given under our hands and seals this seventeenth day of July, in the year eighteen hundred and forty-five.

J. T. WORTHINGTON, (Seal.)

J. T. H. WORTHINGTON, } (Seal.)  
Guardian for Sam'l. Worthington. }

RICHARD JOHNS, Jr., (Seal.)

J. T. JOHNS, (Seal.)

R. HORACE LOVE, (Seal.)

THOS. H. HODGES, (Seal.)

CHAS. G. HANSON, (Seal.)

W. B. NELSON, (Seal.)

Signed, sealed and delivered in the  
presence of *T. Hanson Bell.*"

Which release was duly acknowledged before a justice of the peace, and, on the 12th day of May 1846, was filed and recorded by the register of wills for Baltimore county.

John T. H. Worthington, guardian of Ann M. Worthington and of Comfort Worthington, accounted with his said wards for the several sums of money received by him during their minority from the said executors, and on their arrival at the age of eighteen years, the said Ann Maria and Comfort severally executed releases to their said guardian, wherein each of them acknowledges to have received certain property and money therein specified, "being in full of all property and cash due to me by my said guardian;" and in consideration thereof, each of them "releases, acquits, exonerates and discharges the said John T. H. Worthington, as guardian as aforesaid, his heirs, executors and administrators, of and from all and every action, suit, claim or demand which could or

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might possibly be brought, exhibited or prosecuted against him, them or any of them, for or on account of the above mentioned property and cash, or the payment thereof, hereby declaring myself satisfied, contented and paid, as above specified."

The release of said Ann Maria being dated the 16th day of November 1839, and that of Comfort bearing date the 20th day of February 1841, and were severally acknowledged and duly recorded.

The complainants, Anna Maria and Comfort M., were married at about the age of nineteen years, the former to Charles G. Hanson, in January 1840, and the latter to Wm. B. Nelson, in February 1842.

The original bill in this case was filed on the 1st day of April 1854, against John Tolley Worthington and Samuel Worthington, claiming from said John Tolley Worthington, as trustee, an account of the said \$10,000 legacy, and the manner in which the same had been invested, and that there should be paid to the complainants their respective portions thereof. After answers were filed by the respondents, John T. Worthington and Samuel Worthington, the complainants, on the 8th day of January 1855, filed a petition praying leave to amend their said bill; and the same being granted, they on the 11th of January 1855, exhibited their amended bill, whereby they made parties defendants the said John T. Worthington as surviving executor, (Richard Johns his co-executor having died,) and also all the said residuary legatees, claiming among other things such relief as may be necessary to reform and correct the distribution of the said legacy of ten thousand dollars, so as to give to the complainants their full share thereof, and interest thereon from the time the same became payable, and to cause any of the said parties who may have received more than his, her or their share or shares, to account for, restore and pay over the same as they may be directed by the court, with interest thereon since the date of such wrongful overpayments; and that the whole distribution of said legacy, and its accumulated interest, may be now adjusted, settled and paid over, as if the same had never been erroneously made.

The defence of the several respondents is based upon the

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lapse of time and the *laches* of the complainants in making their claim, their acquiescence and concurrence in the settlement of the estate by the executors, and in the distribution of the assets, and the releases executed by the said Anna Maria and Comfort M. to their guardian, and the release given by their husbands to the executors are also relied upon as a bar to the relief prayed, and the residuary legatees have pleaded the statute of limitations in bar of any claim against them, either by the complainants or by the respondent, Worthington.

A *pro forma* decree having been passed by the circuit court, dismissing the bill, the complainants have appealed to this court.

The respondent, John T. Worthington, by his answer, claims that in the event of his being held answerable to said complainants for their shares of said legacy, the other respondents, Love and wife, Hodges and wife, John T. Johns and Richard Johns, who were overpaid in said distribution among the residuary legatees, ought to be compelled by decree to refund and pay the same to him, or by direct decree to pay the same to the complainants to his relief, and the said John T. Worthington and Samuel Worthington have also appealed from said decree.

It is clear, from the facts and circumstances disclosed by the record, that the executors acted from the beginning under a mistake as to the effect of the renunciation by the widow; and all the errors which occurred in the administration of the estate grew out of that mistake. The legal effect of such renunciation is not any longer a matter of contest in the cause; the authorities abundantly establish that by such renunciation the rights and interests of the legatees in remainder were in no wise affected. See *Darrington vs. Rogers*, 1 Gill, 403; *McElfresh, Admr., vs. Schley & Barr*, 2 Gill, 203.

While, therefore, the renunciation had the effect of striking from the will the bequest to Mrs. Worthington, the estate in the remainder was vested in the persons to whom the same was limited by the will.

We regard the probate of the will, and the taking out of letters testamentary by John T. Worthington, as a sufficient

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evidence of the acceptance by him of the trust created by the will, and there is no proof of any actual renunciation or disclaimer till the filing of his answer in this cause. See *Hill on Trustees*, 214. 2 Wms. on *Excrs.*, 1530.

"Where a party has once fixed himself by any means with the acceptance of a trust, he cannot afterwards, by disclaimer, renounce or repudiate the duties and responsibilities of the office." *Hill on Trustees*, 219.

Looking at the several clauses of the will which we have cited, we are of opinion that the trust created and vested in John T. Worthington, was not limited to the life of Mrs. Worthington, but was a continuing, subsisting trust for the parties in remainder after her death, and the trustee could only be discharged from his obligation by the payment of the fund to the *cestuis que trust*. The legal interest was vested in him by the will; he was charged with the performance of certain duties with reference to the fund; had the power of investing, selling and reinvesting; and to enable him to discharge those duties, and to carry out the purposes of the trust, his estate extended beyond the life of Mrs. Worthington. Such, we think, was the intention of the testator, as gathered from the will. Whatever might be the construction of the will as to the extent of the estate vested in the trustee, if the property devised were realty—and on this question the authorities seem to be somewhat conflicting—here the devise is of personalty, and we entertain no doubt that the fee was vested in the trustee, and could not be devested, except by a transfer by him. *Hill*, in his treatise already referred to, after citing and commenting on the various cases in which this question had arisen, says, on page 248: "The question as to the duration of the estate of the trustees can rarely arise where the subject is personal estate; for in that case the whole legal interest is in general vested in the trustees by a gift, without any words of limitation, and will continue in them until devested by a legal transfer or assignment."

Such being, in our opinion, the true construction of the will, it follows that it was the duty of John T. Worthington, the trustee, to collect and receive the said legacy of \$10,000, for the purposes of the trust.

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If he had been sole executor, it is clear that by operation of law, the fund would be considered in his hands as trustee after the time limited by law for the settlement of the estate. It has been argued that this principle is inapplicable to this case, because Worthington was a co-executor with another; and *Watkins' case*, 2 G. & J., 220, has been cited in support of that view. But it appears from the record that Richard Johns, the co-executor, died before the filing of the bill; Worthington then became, as survivor, the sole executor, and the principle to which we have adverted would therefore apply in the same manner as if he had been sole executor from the beginning. This is the plain inference from the ruling of the court in *Watkins' case*. The trustee is, therefore, answerable to the complainants as *cestis que trust* for their respective proportions of the legacy, unless something has occurred to relieve him from such responsibility. In our opinion, the releases relied upon in defence cannot avail to bar the equity sought by the complainants. Conceding that the releases of the wards to their guardian, made after they had attained the age of eighteen, when by the statute they were competent to execute them, and being made *bona fide*, would operate as a good acquittance to the guardian, still such releases could not operate to discharge from liability any third person holding funds in the character of their trustee, or responsible to them in that character for funds which had never been paid or transferred to their guardian. Nor can the release to the executors, dated the 17th of July 1845, have the effect of discharging John T. Worthington, the trustee, from his liability for the specific legacy. The latter release, by its terms, purported only to discharge the *executors* from the sums due to the parties releasing, as *residuary legatees* of John T. Worthington, deceased, and applied only to the proportions of the personal estate of said deceased due to them in that character.

The only remaining questions for us to consider, are, whether the complainants are barred of their equitable relief by limitations or lapse of time, or their *laches* and delay in making their claim? or by acquiescence and concurrence in the settlement of the estate and distribution of the fund?

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After a careful examination of the numerous authorities cited as applicable to this part of the case, we are of opinion that none of these grounds of defence ought to prevail in this court. The bequest in the will is admitted to be valid, and the accounts exhibited show conclusively that it has not been paid to the parties entitled, owing to a mistake of the executors in the construction of the will. Those accounts show also, the manner in which and the persons to whom the fund has been improperly paid. The parties who have received wrongfully, as well as the executor and trustee, are alive and in court, subject to its decree; and we see no sufficient reason why the court may not do simple justice, by an equitable adjustment of the claims of the parties, and a correction of the errors which have been committed.

We have said that the trust in John T. Worthington, under the will, was a continuing trust; and that being so, we think the facts in the case do not show any such lapse of time, *laches*, or delay on the part of the complainants as can operate to bar their claim against him. What will constitute such a lapse of time and *laches* as will bar the right of parties to recover on a claim purely equitable, all the authorities say, must depend upon the particular facts and circumstances of each case. In the administration of the estate, the duty of the executors was to ascertain the persons entitled to the fund; their proceedings in the orphans court were *ex parte*; no steps were taken by them, under the act of 1798, ch. 101, sub-ch. 14, sec. 12, in appointing a meeting of claimants, nor was the distribution made under any order of the court; it was not conclusive on the complainants, even if they had been *sui juris*. But even supposing that those proceedings were known to the complainants, or were constructive notice to them of the acts of the executors, until the final distribution was made, they were not a notification to them that the legacy was not to be paid; notwithstanding any thing which appeared in the accounts, there might have been sufficient assets in the hands of the executors, not returned to the orphans court, to pay the legacy, or sufficient assets for that purpose yet to be received by them. When the final distribution was made, the com-

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plainants were married women. Under these circumstances, we find no such acquiescence or concurrence on the part of the complainants as ought to preclude them from relief against John T. Worthington, and inasmuch as the respondents, Love and wife, Hodges and wife, John Tolley Johns and Richard Johns, have erroneously received the fund to which the complainants are entitled, they are equitably bound to refund the same, they having taken the fund subject to the trust, and the defences set up by them cannot avail to bar the recovery by the complainants; what we have said as to the responsibility of Worthington, is equally applicable to them. See *2 Johns. Ch. Rep.*, 626, 627. *1 McCord's Ch. Rep.*, 388, 389. *Stephenson vs. Axson*, *1 Bailey's Eq. Rep.*, 274.

The sum which the complainants were entitled to receive under the will, was one-fourth part each of the legacy of \$10,000; having already received the one-eighth part each of that sum, in the distribution erroneously made, there remains due to each of them the principal sum of \$1250, on which we think they are equitably entitled to receive interest from the time that the same was wrongfully paid to the residuary legatees.

The payments were made to them in various sums and at different times, running through a period of several years; a portion of the money thus paid to them, they were entitled to as residuary legatees, and in fixing the time from which interest is to be counted, we adopt the date of the last payment. Considering that the amount which the complainants are entitled to recover ought to be paid by John T. Worthington primarily, and that he is entitled to relief against the respondents, Love, Hodges, John Tolley Johns and Richard Johns, who are ultimately bound for the same, we shall decree accordingly.

As to the respondent, Samuel Worthington, who, by his answer, disclaims any claim for the portion of the legacy due to him, the bill ought to be dismissed.

*Decree reversed, and*

*decree in favor of complainants.*

(Decided July 22nd, 1858.)

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The same judge delivered the following opinion on the appeal of John T. Worthington and Samuel Worthington:

The decree from which this appeal was taken, was in favor of the appellants. They were respondents below, and by the decree of the circuit court, the bill was dismissed with costs. The appellants were, therefore, in no manner aggrieved thereby, and the appeal by them was erroneous, and must be dismissed. In order to save the rights of the respondents, John T. Worthington and Samuel Worthington, as set up by them in their respective answers, no appeal on their part was necessary.

*Appeal dismissed.*

(Decided July 22nd, 1858.)

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### **JOHN S. WRIGHT vs. SANTA CLARA MINING ASSOCIATION OF BALTIMORE, and others.**

A person having no interest in the question litigated between the parties, to a suit in equity, and against whom *no relief* is prayed by the bill, is not a *necessary party* to the suit; whatever rights he may have, he can assert in a proceeding to be instituted by himself.

#### **APPEAL from the Circuit Court for Baltimore city.**

This appeal was taken from a decree of the court below (*Krebs, J.*) dismissing the bill in this case, filed by the appellant against the appellee, upon the ground, that John B. Gray was not "made a party to the cause, and an opportunity afforded him to be heard in reference to his alleged rights, interests and pretensions, referred to in the bill."

The bill alleges, that articles of association were subscribed by R. J. Walker and others, for the purpose of forming a company to work a quick-silver mine in California. That the Company was called the Santa Clara Mining Association of Baltimore. And that on the 6th of June 1850, said Gray and wife conveyed the land on which the mine was situated to Isaac Tyson Jr. and others, *in trust*, to stand seized and pos-

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cessed of the same, for the use of the Association, till it was incorporated, and then to convey the same to the corporation, and its assigns freed from the trust. That Gray signed these articles of association, and under the same certificates of stock therein were issued to him and the other members of the Association, which were transferable, and some of them in fact were transferred by Gray and others to third persons. That an adversary title to the lands and mines so conveyed by Gray, was asserted by persons residing in California, and another association called the Guadalupe Mining Company, was formed for the purpose of working the same mines, and had possession thereof, and had also obtained a confirmation of their title by the Board of Land Commissioners, established by the United States in California. That the said Santa Clara Association did not work these mines at any time, and had raised no means for that object, and that owing to this fact and the difficulties surrounding the title, it was agreed by these two rival Associations, that it was for the interests of both to compromise their contention and consolidate into one company. That the Legislature of Maryland, had, by the act of 1852, ch. 317, incorporated the said Santa Clara Company, but the charter thereof was not accepted by the same, owing to said disputes and difficulties of title. That on the 19th of July 1855, the proposed compromise and consolidation was made; and by the agreement thereof the sum of \$333,333.33, in stock of the new Association, which adopted the name of "The Santa Clara Mining Association of Baltimore," and which also at once accepted the charter aforesaid, was apportioned to John Hanson Thomas, John M. Gordon and Robert J. Walker, as trustees for the shareholders of the original Santa Clara Mining Association of Baltimore, as heretofore existing. That the complainant John S. Wright, became the owner, by purchase of several of the original certificates of said original Santa Clara Association, and being desirous of converting them into the stock of the consolidated and chartered company, according to the terms of the aforesaid consolidation; he is entitled to have a specific execution thereof, but that Isaac Tyson, Jr., and others, the surviving trustees named in

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the aforesaid deed of trust from Gray and wife, refuse and omit to make the necessary deeds of transfer and conveyance to said corporation, as provided in said deed, and as they ought to do according to the effect and meaning of the articles of association, subscribed by them and by said Gray and wife, and the resolutions and consolidation and proceedings before stated, and that John Hanson Thomas and John M. Gordon, who are named in said articles of compromise and consolidation, as co-trustees with said Walker, to receive and hold the stock in said corporation, for the benefit of the shareholders in said unincorporated Association, do also now refuse and omit to unite with Walker, in receiving and endorsing said stock, and making the necessary subdivision and apportionment thereof, among the parties respectively entitled, although they have assumed the said trust. That the trustees in said deed of trust, as well as said Gordon and Thomas, and all other shareholders except said Gray, are personally willing and desirous to ratify and perfect the articles of consolidation, but that they, the said trustees, are restrained from so doing by *caveats* and threats from said Gray, whose pretensions the bill charges are idle and unfounded, and ought not to be regarded by said trustees. The bill then prays, that the aforesaid compromise and consolidation may be decreed to be specifically executed, and all necessary transfers of title made, and that the stock coming to the shareholders of said unincorporated association, may be allotted to them in their respective proportion of stock in said corporation, and especially that the surviving trustees named in the aforesaid deed of trust, may be decreed to convey to said corporation the legal title in them vested by said deed, and for general relief.

To this bill Thomas, Gordon and the surviving trustees in the deed from Gray, and the incorporated Santa Clara Mining Association of Baltimore, were made defendants. The exhibits filed with the bill, show that the original articles of association, formed under and in pursuance of said deed of trust, and signed by Gray and wife, provided that the property conveyed by the deed should remain vested in the trustees therein named and the survivors of them, subject to the control and direction of the shareholders of the Association, by a vote of at

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least two-thirds of the whole number of shares in the affirmative, and that the business of the Association, should be managed by a board of directors, who, or a majority of them, "shall have power with the sanction of a vote of two-thirds of the whole number of shares, to sell any of the lands or mineral rights of the Association, or to purchase other mineral rights and lands, or, if deemed necessary, increase their capital stock," and that the compromise and consolidation referred to in the bill, was made and agreed to by a vote of more than two-thirds of the shareholders of the original Association, Gray, however, objecting thereto, and that by the terms of the consolidation, the surviving trustees in this deed of trust, and Thomas and Gordon, bound themselves to do what this bill requires of them.

The answer of Thomas, Gordon, and the surviving trustees in the deed of trust, admit most of the allegations of the bill, but say that after receiving, in October 1855, from the attorney of John B. Gray, a notice or caution not to transfer as trustees any of the property, the respondents Gordon and Thomas, declined to receive and distribute as trustees any more of said stock of the consolidated or incorporated company, wishing the direction and protection of a court of competent jurisdiction in the execution of their duties as trustees, whether in conveying the premises or in receiving and distributing the new stock. These respondents are personally willing as shareholders in the said unincorporated company, to ratify and perfect the articles of consolidation, but, as trustees, are restrained from so doing by the caution aforesaid of Gray, and by the desire to act under the instruction of a court of chancery for their protection, being unwilling, without such direction, to receive and distribute certificates of stock, representing property and mineral rights of great supposed value, (the title to a part of which is disputed by Gray,) which certificates will become subject to purchase and sale, and be distributed among the public. These respondents further state, that Gray, who is stated in the bill to have objected to the transfer of the property by the trustees, is not made a party defendant therein, and since the filing of this bill, said Gray and wife have filed their bill in the

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Circuit Court of the United States, against the said trustee sand others, praying among other things that the consolidation or union of the 19th of July 1855, and any conveyance from the Association to the corporatiou formed under this union, may be declared null and void, and that the incorporated company may be restrained by injunction, from issuing any stock representing any interest in the property conveyed by Gray and wife to said trustees, and that the latter be restrained from conveying said property to the incorporated company. That upon notice to the trustees and co-defendants, the court refused to grant said injunction as prayed, and were of opinion that the act of consolidation ought not to be disturbed, and that the same was legal to all intents, and that on demurrer filed, the court would dismiss the bill.

The case was submitted on bill, answer and exhibits, and from the decree dismissing the bill passed as before stated, the complainant appealed.

The cause was argued before LE GRAND, C. J., TUCK and BARTOL, J.

*Robert J. Brent* and *Henry May* for the appellant, argued that the complainant was not bound to make Gray a defendant:

1st. Because he has conveyed all his interests to the trustees Tyson and others, by the deed of the 6th of June 1850, and the articles of Association. He has no other rights than as a stockholder, and every stockholder may equally claim to be made defendant, and unless all are included in the case, the bill would be dismissed on the grounds of the decree appealed from. The trustees alone represent the *cestuis que trust*, who are numerous, and have agreed to do simply what the *cestuis que trust* have directed and thus imposed as a duty, and no court of equity will interfere. *Hill on Trustees*, 278, 471.

2nd. Because the trustees Gordon and others, with the consent of the stockholders of the old Santa Clara Mining Company, or a legal majority of them, signed the obligation to

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accept and distribute the stock claimed by the complainant, in the chartered company, and thus are bound to fulfil their solemn engagement, on the strength of which the complainant purchased the stock of the old Company because of its convertibility into the new.

3rd. Because he is a non-resident, and declines to sue the trustees or enjoin them or make himself a party in this cause.

4th. Because he cannot be affected by the decree prayed for in this bill, as his stock in the old Company cannot be transferred into the stock of the chartered Company, and he cannot be prejudiced, unless he surrenders the same and consents that it be done. It is a hardship upon the complainant, and every other stockholder, to be prevented from enjoying the benefit of this consolidation, because Gray chooses by his mere *fiat* issued from New York, to enjoin the trustees, and in this way practically supersede the appointed judicial tribunals.

5th. Because as the record shows, he has heretofore claimed the aid of the federal court in Maryland to protect his alleged rights, and the same grounds on which he now rests this his *private caveat*, have in the judicial tribunal of his own choice been utterly condemned, and in this condemnation he has acquiesced by forbearing to proceed any further with his case.

It will be thus seen, that so far as Gray is concerned, he did, as far back as 1850, divest himself of all legal title by his deed to Tyson and others, for the benefit of the shareholders in the original Association. He, therefore, has no interest whatever except as a *cestui que trust*, the same as any other stockholder, nor is there the slightest evidence in the record, that he still holds a single share of stock in his hands. His rights as *cestui que trust*, are fully represented by making Tyson and others trustees, defendants; but he has no such rights, for the *consolidation* was effected by virtue of *powers* vested in two-thirds of the shareholders, by the articles of Association signed by Gray himself. Having therefore authorised the sale to the consolidated company, he must take it as legally binding on him, and can only claim to come in for the benefits of the consolidation. The whole case stands thus: If Gray has outstanding adversary rights, they cannot be affected by this suit to

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which he is no party; if he authorised the trustees to sell and consolidate, then why respect his *caveat*? The equity rule requiring *cestuis que trust* to be made parties does not apply in this case, because, with respect to the duty and trust sought to be now enforced, Gray is not even a *cestui que trust*; the trust of which he was such, was closed by the articles of consolidation, executed under powers granted by him. It is in principle like the case of *Goodson vs. Ellisson*, 3 *Russell*, 583. But the rule as to *parties* in a court of equity, is always in the discretion of the court, *for the purposes of equity*, and where parties are very numerous or difficult to be brought into the case, it will be dispensed with. 2 *Pet.*, 482, *Mandeville vs. Riggs*. 10 *Wheat.*, 166, *Elmendorf vs. Taylor*. 3 *Cranch*, 221, *Milligan vs. Milledge*. And in conclusion we say, that the rule as to parties in suits in equity, has been laid down very concisely by the Supreme Court of the United States, in the case of *Kerr vs. Watts*, 6 *Wheat.*, 559, in these words: "No one need be made a party complainant, in whom there exists no interest, and no one a party defendant from whom nothing is demanded." It is seen by the bill in this case, that *nothing is demanded of Gray*.

No counsel appeared for the appellees.

LE GRAND, C. J., delivered the opinion of this court.

We do not discover, on an examination of the record in this case, that John B. Gray has any interest whatever in the question litigated between the parties to this suit, and inasmuch as no relief is prayed against him he was not a necessary party. Whatever rights he may have, he can assert in a proceeding to be instituted by himself. 6 *Wheaton*, 559, *Kerr vs. Watts*. 11 *Maryland, Rep.*, 158, *Crook vs. Brown*.

*Decree reversed and cause remanded.*

(Decided Nov. 2nd, 1858.)

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**JOSIAH HUGHES vs. SAMUEL JACKSON.**

A case was continued under an *agreement* that it should be struck off at the next term, if not tried, and judgment for the defendant for costs. Subsequently to the next term, the plaintiff had leave to *amend*, and the defendant *pleaded* to the amended *nar*, and the case was carried on to judgment, without notice taken of the agreement. **HELD:**

That the proceedings subsequent to the agreement constituted a *waiver*, with the concurrence of the court, of all advantage conferred upon the defendant by the agreement.

Where the court below refused to consider reasons for a new trial because not filed within the time required by the *rules* of court, such decision cannot be reviewed on appeal.

Where a court has established rules for its government, and that of suitors, there exists no discretion in the court to dispense at pleasure with such rules, or to innovate on established practice.

There are but two cases in which, in a court of law in this State, a *nigro* suffers a disqualification because of the *presumption* arising from his color, the one where he is offered as a witness in a case where a white person is interested, the other where the question is freedom *vel non*.

A free negro suing in our courts is sufficiently described by the word "negro," for it notifies the adversary party of the fact of color, and affords him an opportunity of pleading the disability of slavery, if it exists.

**APPEAL from the Circuit Court for Dorchester county.**

*Trespass q. c. f.* for breaking and entering the plaintiff's messuage or dwelling-house, and taking and carrying away his children, brought on the 10th of March 1851, by the appellee against the appellant and another, who died before trial. In the writ, declaration and proceedings the plaintiff is described as a "negro," and in the original *nar*, which was in trespass *vi et armis* for an assault and battery, the defendants are described as "free negroes."

The case, after plea of *non cul* and issue, was continued from term to term till October term 1853, when it was continued under an agreement "to be struck off at the next April term of this court, if not tried, and judgment to defendant for costs." It was then continued, by regular continuances, till July 1854, when the plaintiff asked and obtained leave to *amend* his declaration. The case was then continued till

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January 1855, when the *amended nar* was filed, charging the defendants with breaking and entering the plaintiff's messuage or dwelling-house, and taking and carrying away, and converting to their use his property, to wit, his two children of the value of \$1000. The case was then continued till the 22nd of April 1856, when the defendants pleaded *non cul* to the amended declaration, upon which issue was joined. The record then shows that, on the 24th of the same month, after the jury was sworn to try the case, the defendants made a motion to dismiss, which was overruled, and a verdict rendered in favor of the plaintiff, on the 26th of the same month, for \$750 damages.

On the day the verdict was rendered, the defendant moved for a *new trial*, and on the third day thereafter filed as reasons therefor that the verdict was against law, evidence, and the instructions of the court, and that the damages were excessive. On the fourth day after the verdict, the defendant also moved in *arrest of judgment*, "for reasons apparent on the face of the papers and pleadings." Afterwards, on the 13th of June, the defendant filed an additional reason, accompanied by several affidavits, in support of his motion for a new trial, upon the ground of newly discovered evidence.

The court (BRICE J. GOLDSBOROUGH, Special Judge,) overruled both motions, and filed an opinion stating that "in overruling the motion for a new trial, the court refused to consider the reasons filed as of the 13th of June 1856, because they were not filed within the time required by the 22nd rule of said court, which is as follows." The rule is then set out in the opinion of the court below as stated in the opinion of this court. From this ruling upon the reasons aforesaid, and from the decision of the court upon the motion in arrest, the defendant appealed.

The cause was argued before LE GRAND, C. J., TUCK and BARTOL, J.

*Elias Griswold* for the appellant:

1st. A court has no power to allow a plaintiff to amend his *nar* and declare anew in direct violation of an *agreement* en-

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tered on the record at a previous term, "that the case should be struck off," if not tried at a term intermediate the agreement and the motion to amend, and a subsequent pleading of "*not guilty*" to the amended *nar*, does not *cure* this irregularity. The record shows that a motion was made to *dismiss the case*, and such a motion is in accordance with the act of 1825, ch. 117, (9 *Gill*, 248, *Cushwa vs. Cushwa*; *Ibid.*, 269, *Newcomer vs. Keedy*,) and as the overruling of this motion was not a final decision of the case, an appeal could not *then* have been taken. 7 *Gill*, 366, *Welch vs. Davis*. *Ibid.*, 33, *Wheeler vs. The State*. 7 *G. & J.*, 109, *Boteler vs. The State*. 3 *Gill*, 246, *Baldwin, use of Owens, vs. Wright, et al.* 3 *Md. Rep.*, 326, *Bridendolph vs. Zellers*.

2nd. The courts had no power to grant amendments from one form of action to another, till the act of 1852, ch. 177, which does not apply to any case *then commenced*. This irregularity of amending from *nar vi et armis* to *q. c. f.*, could not be taken advantage of by *demurrer*, for the new *nar*, unlike the first, was in accordance with the *writ*, and not, therefore, demurrable. The error could only be taken advantage of by motion to dismiss, and this motion was available after as well as before the plea of *non cul*, because the right to amend is in the discretion of the court, and the changing from one form of action to another, was in accordance with the *writ*. The defendant must plead, and avail himself of the irregularity in granting the amendment contrary to solemn agreement, and the irregularity in amending from one form of action to another, by his motion to dismiss, and by motion in arrest of judgment, which goes to the whole record. 4 *G. & J.*, 416, *Charlotte Hall School vs. Greenwell*. *Ev. Pr.*, 332.

3rd. A *slave* having no civil rights, cannot, in Maryland, sue or be sued in an action of trespass *q. c. f.*, (4 *H. & J.*, 547, *Wicks vs. Chew*; 5 *H. & J.*, 190, *Hall vs. Mullin*; 9 *G. & J.*, 19, *Bland vs. Negro Dowling*; 4 *Gill*, 249, *Peters vs. Van Lear*;) and the court must *presume* one described in an original *writ* and all the proceedings in a case as a "*negro*," to be a *slave*. 6 *G. & J.*, 136, *Burke vs. Negro Joe*. 4 *H. & McH.*, 295, *Mahoney vs. Ashton*. If he was described as

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a "free negro," a plea to the merits would acquiesce in his description of himself, and throw upon the defendant the burden of denying his freedom and right, but in the absence of any description except "negro," he is presumed to be a slave, and the whole action and proceedings are null and void. The distinction attempted to be set up, that a negro is presumed to be a slave only when he is held and claimed to be such, or only in petitions for freedom, is inconsistent with the law of nations, our statute law, and the decisions of our courts, as well as the position of the race in the domestic relation recognised in slave States. The necessary corollary from the position is, that negroes are presumed to be free; i. e., have civil rights, except when they are held and claimed as slaves, or except in petitions for freedom. If this be so, what will you do with the 22nd sec. of the act of 1715, ch. 44, which declares "that *all negroes* and other slaves already imported or hereafter to be imported into this province, and all children now born or hereafter to be born of such *negroes* and *slaves*, shall be slaves during their natural life?" What will you do with the principles asserted in the case of *Anderson vs. Garrett*, 9 Gill, 128, where the negro, Rebecca, continually resided in Baltimore, with her children, for eighteen years, reputed as a free woman, and acting as such, making contracts, &c., and yet the court says, that negroes going at large and acting as free for any length of time, will not *per se* be a sufficient foundation to presume a deed? Where and what was the presumption in their case all the time they acted as free? Was it in abeyance, or did not the presumption of slavery arise till the master claimed them? Suppose Rebecca had brought suit as a "negro," not alleging her freedom, during these eighteen years, against a third party, could the defendant have avoided the suit by *allegation and proof* of her slavery, without any holding and claim ~~by the master~~? Then the *presumption* or the *fact* of slavery does not depend on the holding and claim of the master. But the defendant need not *allege or prove* slavery. The *presumption* and the *fact* is, she is a slave as "*all negroes and other slaves*," and their children by statute are, and the going at large and acting

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in all respects as free, and reputed as free, does not help them. If she had sued as "*free negro*," pleading to her *mar* might admit her description of herself, though it has been decided in Maryland that suing negroes, treating them as if they had civil rights, does *not admit* their freedom, or, at least, their being made parties does not prevent their being sold as slaves. 7 G. & J., 96, *Allein vs. Sharp*. The reverse would certainly hold that pleading to their complaints, would not admit their freedom or give them civil rights. Further, if the doctrine holds that negroes are presumed free, except when held and claimed as slaves, or in petitions for freedom, what will you do with the law as elucidated in this same case of *Anderson vs. Garrett*, that in Maryland the law recognises but two modes of manumission, by "*deed*" and by "*will*" duly executed? Will you presume such deeds and wills to exist, without their production? Sometimes—but when? Only when there is parol proof of twenty years or upwards going at large, with pregnant circumstances otherwise of freedom. But going at large, acting as free, reputed as free, abandonment by master, are no sufficient foundation for such a presumption, much less, in the absence of all proof of freedom, will the suing as a *nigro* raise a presumption of freedom. Besides all this, the presumption that they are free, except when held and claimed as slaves, or in petitions for freedom, raises an exceptional rule very unjust to them, and in favor of the master. When they most need the presumption it is gone. The only just and true rule is to regard them as nature and revealed religion, and our laws, regard *them* at all times, and as we regard children before the age of twenty-one, as having no civil rights, dependent, needing protection, guidance and a master. And until, in the one case, the age of twenty-one is reached, and in the other, until by deed or will they are manumitted, the law justly and humanely regards them, and presumes them to be what they are, children and slaves. The law does not commit the folly and injustice of presuming negroes free, except when the presumption is some benefit to them in petitions for freedom. Justice, the institution of slavery, or the master, asks no such presumption when the right of the master is asserted, unless the pre-

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sumption rests on the broad and proper principle that they are always considered slaves by their natures, their capabilities, their position among their superiors, by the law of the land, and by divine arrangement and revealed law, their unfitness for civil rights, their need of pupilage, protection and guidance.

4th. It is no doubt good law that a defendant, before he can avail himself of the *disability* of a plaintiff to sue, must do so by plea in abatement. This is so when a party has any *status* as a person or a citizen, not where the presumption of law is, that they have no civil rights. It becomes a question of jurisdiction, and want of jurisdiction may appear in the record without any plea in abatement. This is ably elucidated in the opinion of Chief Justice Taney in the *Dred Scott case*. Besides, the right to sue must appear *affirmatively*, but in this case the term *negro* makes the contrary appear. This view is clearly held in the case most relied on by the appellee, 5 *H. & J.*, 130, *Shivers vs. Wilson*, where the court say, while recognizing the doctrine that a defendant must avail himself of the disability of a plaintiff to sue by plea in abatement, "if the act of 1795, ch. 56," (of attachments,) "comprehends the case at bar, no exceptions to the plaintiff's disability was available, except by *plea in abatement*; if, on the contrary, that act extends not to the case, the plaintiff had no right to recover, and the decision against him was correct." So here, if slaves, negroes, those presumed to be slaves, are comprehended among those having a right to sue in this State, no exception to their disability is available, except by plea in abatement. If, on the contrary, no law extends to them civil rights, the plaintiff in this case had no right to sue. For these reasons our motion to dismiss should have prevailed.

5th. The discretion vested in the courts to grant new trials, is not a capricious, but a sound, legal discretion, to the proper exercise of which the party claiming it is entitled, and from which he cannot be properly debarred by any rule that is a mere creature of the court. This appeal, in so far as it relates to this point, is not from the refusal to grant a new trial, but from the legal effect and application of the rule of the court below, and this is a proper ground of appeal. 11 *G. & J.*, 92,

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*Dunbar vs. Conway.* Though there is no doubt courts are bound by their own rules, and when violated to the *injury* of parties, a remedy exists by appeal, yet where no injury would result, they may be waived, in the discretion of the court. The rule in question, moreover, carried to the extent of refusing to consider an additional reason filed for a new trial before the argument of the motion, because not filed within the four days, is inconsistent with the due exercise of the discretion vested in courts to grant new trials, and subverts the ends of justice. In the case of *Union Bank vs. Ridgely*, 1 *H. & G.*, 404, the question being, whether a plea of *non est factum* could be received after a plea of *general performance*, directly in the teeth of a rule of court declaring "that no incompatible plea shall be received," the court citing the act of 1809, ch. 153, says: "The discretion vested in the courts by that act is not a capricious, but a sound, legal discretion to the proper exercise of which the party claiming it is entitled, and from which he cannot be debarred by any rule which is the mere creature of the court." The discretion to grant a new trial, although not statutory, in no respect differs in character from that given by this act. It is a power, the offspring of the inherent authority of the courts; a discretion, but nevertheless a sound, legal discretion. And although a court may, for convenience, or to prevent vexatious delay, order that such motions and the reasons therefor shall be filed by a certain day, yet such rule, the mere creature of the court, cannot override the great ends of justice, and debar a party from the full exercise of the sound, legal discretion of the court upon all the reasons filed before argument, when the *motion was in time*. Some of the reasons being filed in time, and the additional reasons appearing from the records and affidavits not to have been known to the party at the time of filing the first, such a narrow construction is without warrant, even of the language of the rule, much more inconsistent with the due exercise of the court's discretion, and subversive of justice and a fair trial of the merits of the case. In *Carroll vs. Barber*, 7 *H. & J.*, 454, where the application was alone to *relax* a rule of court, and not involving a *construction* of the rule, the Court of Ap-

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peals refused to relax but upon the grounds, 1st, that the proceeding appealed from was interlocutory and not final, and 2nd, that no *just cause* was shown. The language of the court clearly evinces that had the appeal had *merits*, they would have reviewed it differently. In the case under argument the circumstances are shown, by proof, why the reasons were not sooner filed, and the ends of justice require a relaxation of the rule, if indeed its language compasses at all the exclusion of any additional reasons. The case of *Wall vs Wall*, 2 H. & G., 79, affirms the *right* of appeal in this case, and the decision there that the plea would not be received because not in by the rule day, is not against us here, because in that case *no plea* was in in time; and it was a plea of limitations not to the *merits*, and not *amendable*. Had any plea been in in time, which was to the *merits* and *amendable*, it must have stood, and might have been withdrawn and a new plea filed. Here the motion and some of the reasons were in time, and any additional reasons before argument are not excluded by the terms of the rule. In *Gist vs. Drakely*, 2 Gill, 330, the court, in deciding that the court below had a right to enforce its own rule excluding testimony after questions of law were raised, put that decision upon the ground that it did not appear that the testimony was out of the reach of the defendant, or was afterwards discovered. Here this meritorious ground appears, and also the *cause* why the additional reasons were not filed sooner. The court below seemed to think it had no discretion to dispense with the rule, but the case cited shows that it had that discretion.

6th. Upon the motion in arrest of judgment, all the objections apparent in the record avail to reverse the court below, and the refusal to arrest is the subject of appeal. On such appeals the appellate court will look to the whole record, notwithstanding the act of 1825, ch. 117. 4 G. & J., 416, *Charlotte Hall School vs. Greenwell. Ev. Pr.*, 332.

*James Wallace and Chas. F. Goldsborough* for the appellee:

1st. It was not necessary to aver in the declaration that the

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appellee was a “*free negro*.” The law of Maryland does not presume under *all* circumstances that a negro is a slave. In all cases where he is held and claimed *as* a slave, and in all petitions for freedom the courts have decided, that he is presumed to *be* a slave, and the *onus probandi* is upon him to make out his freedom, as in the case of *Burke vs. Negro Joe*, 6 *G. & J.*, 141, and *Mahony vs. Ashton*, 4 *H. & McH.*, 305, but the courts have never decided that in other cases all negroes should be regarded as slaves. The opinion, that all negroes held and claimed as slaves were such, was founded upon the acts of 1663, ch. 30, and 1715, ch. 44, declaring that all *negro* and other *slaves*, imported or *to be* imported, and their children should be slaves *durante vita*, but those acts especially that of 1715, does not declare all negroes *free at that time* or before, nor their children slaves. It says, all negroes and *other slaves*, now imported or hereafter to be imported, &c. It was not the design to make and declare all negroes, whether free or otherwise, then in the State, slaves, but simply that all *negro slaves*, and *other slaves*, should be regarded as slaves for *life*. This will appear by reference to the 5th and 26th sections, where free negroes are especially recognised. Previous to this act an idea prevailed, that baptizing worked a manumission, as appears by the 23rd section, and it was to remove any doubts upon the subject that the act was passed. The first decision upon the point after the passage of the act of 1715, was the case of *Mahoney vs. Ashton*, where the court say, the words of the statute do not operate to make those slaves who were free at the time of the passage of the act, but simply that all negroes held *as slaves* were such, and cast the *onus probandi* upon such as petitioned for their freedom. This doctrine was not questioned until the decision in the case of *Burke vs. Negro Joe*. In that case the court say: “a negro in this State is presumed to be a slave, and on an application for freedom must prove he is descended from a free ancestor, or that he has been manumitted by deed or will.” When carefully examined, this decision will not be found to be in conflict with the case of *Mahoney vs. Ashton*, or the prevailing opinion of the profession since that date. The court

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say, a negro in this State is presumed to be a slave, &c. So he is, all admit, in cases where he is held and claimed as a slave, or as in such a case as was then before the court, but the court say no more; they do not decide that he is presumed to be a slave in all cases and under all circumstances. Negroes going at large and acting as free, are regarded as free men, and presumed to be such until claimed as the property of some one. Such was the opinion and common law of the State before the aforesaid acts of Assembly. In certain cases they voted, bore arms, gave evidence in courts, and performed other acts now confined to the white man. They are now restrained from voting, bearing arms, and giving evidence, by statutes of 1717, ch. 13, 1846, ch. 27, 1783, ch. 23, 1796, ch. 67, sec. 5, but the presumptions are the same as before these acts. The various cases cited by the appellant, are not in conflict with this position. They were all cases where the parties were claimed as the property of some one.

2nd. Has a negro any *status* as a person or citizen, and can he sue in the courts of this State? If he be a slave he can only sue for his freedom: he has no other right to appear in court: he can have no property to defend or wrong to redress. If he be free he is still not a citizen nor is he an alien. He occupies an anomalous position, having more rights than a stranger, yet not the same as an heir. He can sue and be sued in our courts, hold property and enjoy the fullest protection of our laws. In the *Dred Scott case*, the Supreme Court did not decide that a negro from his color was presumed to be a slave, but that no one who was of African descent could be a citizen of the United States, and sue in the United States' courts. He might still be a citizen of a State, and as such a free man, but still not entitled to reap the benefits of citizenship of the United States. No point in that case conflicts with the position of the appellee.

3rd. But if the argument of the appellant be true, that all negroes are presumed to be slaves, and as such are incompetent to sue, unless it be alleged that they are free, the appellee insists, that it is now too late to rely upon it. The objection cannot be sustained upon a motion in arrest of judgment.

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The defendant should have pleaded the disability to sue in abatement. The court below being one of general jurisdiction, the personal disability should have been taken advantage of in that manner; it can be done in no other way. 5 *H. & J.*, 130, *Shivers vs. Wilson*. The defendant, however, never denied the ability of the plaintiff, either by any pleading or by evidence adduced on the trial. He has by his proceedings admitted his competency, and it is now too late to object: he is estopped. The description of the plaintiff is nothing more than ambiguous, and if the court can be asked to presume that the term "negro" implies a slave, and disqualifies the plaintiff from bringing or sustaining his action, certainly after verdict the plaintiff can ask the court to presume, that the defendant admitted his competency, or that every thing was proven on the trial, that was necessary to make the case out fully and completely. 5 *H. & J.*, 130. 7 *Gill*, 211, *Patterson vs. Crookshanks*. 4 *G. & J.*, 418, *Charlotte Hall School vs. Greenwell*. 1 *Gill*, 165, *Baden, et al., vs. State, use of Clark*. If the averment was defective and insufficient, and the defendant pleads to it and goes to trial, and the verdict be against him, he cannot avail himself of the defect, for it will be cured, and every legal intendment will be made to sustain the verdict. 3 *H. & J.*, 383, *Walsh vs. Gilmor*. If the averment that the plaintiff is a negro, be ambiguous and uncertain whether he was a free man or a slave, the defect or ambiguity has been cured by verdict, and the court should presume, that the ambiguity and uncertainty was removed at the trial, and proof necessary to sustain the issues was produced, and sustain the verdict by every fair legal intendment. 11 *G. & J.*, 472, *Ragan vs. Gaither*.

4th. Though there was an agreement that the case should be struck off if not tried at a certain time, yet when the time arrived no motion was made to strike the case from the docket, nor an application for judgment of non-suit, but the defendant permitted the plaintiff to amend his *nar*, and consented to a continuance of the cause from term to term, and then knowingly and willingly without objection, pleaded to the amended *nar* long after the agreement expired. These proceed-

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ings, and joining issue and proceeding to trial, abrogated the agreement, and the court below was justified in presuming it had been rescinded or had been waived by the defendant. What else could be inferred from this strange conduct? If he intended to insist upon the contract, why did he not do it when the time arrived? Why did he plead? Why did he swear a jury? After the jury were sworn, it appears that he made a motion to dismiss the case, but the record does not inform the court upon what ground the motion was based, whether for the violation of the agreement or for some other cause. If such *laches* were tolerated, great wrong would be perpetrated, and parties involved unnecessarily in large bills of costs, in bringing a cause to trial to be surprised by the revival of an old agreement that had long been abandoned by both parties. The agreement could have no more binding effect than a rule of court, and if the party failed to avail himself of the benefit of the rule, but suffered the other party after the term limited to file his amended *nar*, and then pleaded to it and went to trial, it would clearly be considered too late to enforce the rule, the court would consider that he had waived the rule. So we think in the case of an agreement, and that the court below was right in overruling the objection.

5th. In this case there was no amendment from one cause of action to another, as the appellant has argued. The writ was issued in *trespass quare clausum fregit*. The original *nar* set forth a case of *trespass vi et armis*. The error was perceived, and, upon application, the court permitted the plaintiff to amend, and the amended *nar* was filed, in accordance with the writ, for a *trespass quare clausum fregit*. So it is manifest there was no amendment from one class of action to another, and no force in this objection of the appellant.

6th. The court did not err in refusing a new trial upon any of the grounds stated by the appellant, and the refusal to grant this motion is not a ground of appeal. The whole matter is left to the sound discretion of the *nisi prius* court. 5 H. & J., 174, *Anderson vs. The State*. 2 H. & G., 79, *Wall vs. Wall*. Not only is the whole subject of new trials left to the discretion of the courts, but they are authorised to enact rules

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to govern the practice in such cases, and such rules are, while in force, a law unto the courts as well as suitors, and if the appellant failed to file his reasons within the time limited by the rule in question, the court was bound to exclude them, unless from peculiar circumstances it considered it proper to relax the rule, and the propriety of relaxing or not is left to the sound discretion of the court. But had the court relaxed the rule and considered the additional reason, it would not have been justified in granting a new trial, because no sufficient case was presented.

LE GRAND, C. J., delivered the opinion of this court.

This case comes before this court on an appeal from the decision of the circuit court overruling a motion in arrest of judgment. The principal question which underlies the case is, whether a negro can maintain an action in this State, without first averring in his pleadings, and establishing by proof, his freedom; it being contended, that the presumption of slavery arising from color, applies *in every case*, and is not confined to those originating in a petition for freedom. There are other matters alluded to and insisted upon by the counsel for the appellant, but they are of minor importance. The first is, that the amended declaration does not conform to the writ. An examination of the pleadings will show this to be simply error in point of fact. It is true, however, that the declaration which was filed in the first instance did not agree with the writ, but this oversight was corrected by filing another declaration to which the defendant pleaded, and on which issue was joined and the case was tried. The writ was issued on the 10th day of March 1851; on the 18th day of October 1853, (there having been continuances,) the following agreement was entered into and made a part of the record:—"Continued upon the following agreement, to be struck off at the next April term of this court if not tried, and judgment to defendants for costs." Subsequently the plaintiff had leave to amend, and did amend his declaration, and to this amended declaration the defendant pleaded, and the case was carried on to judgment, without any notice being taken of the agreement to which we have referred.

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This we consider a waiver, with the concurrence of the court, of all advantage conferred upon the defendant by the agreement. Had this not been the case the judgment for costs would have been entered. The subsequent proceedings are only reconcilable on the hypothesis of a waiver of the agreement. But, inasmuch as a motion in arrest of judgment brings up the whole record, it is contended, that the court ought to have granted a new trial. The court overruled, as its opinion shows, the motion for a new trial, and refused to consider the reasons filed as of the 13th of June 1856, because these reasons were not filed within the time specified by the rules of court. The 22nd rule of the court is as follows: "Ordered, that all motions in arrest of judgment and for a new trial shall be made, and reasons filed within four days next after trial, if the court shall continue so long, if not then, during the sitting of the court." Where a court has established rules for its government, and that of suitors, there exists no discretion in the court to dispense at pleasure with their rules, or to innovate on established practice. *Wall's Ex'rs, vs. Wall*, 2 H. & G., 79. *Benson vs. Davis*, 6 H. & J., 272. *Abercombie vs. Riddle*, 3 Md. Ch. Dec., 320. This being so, then the appellant has nothing to complain of, or which this court can correct on this appeal, and as a consequence, the judgment must be affirmed. But the question to which we adverted in the commencement of this opinion, and which arises on the motion in arrest, is one of great practical importance, and we will decide it so as to remove all doubt in regard to it for the future. We know of but two cases in which, in a court of law in this State, a negro suffers a disqualification because of the presumption arising from his color. The one is, where he is adduced as a witness in a case in which any *white* person is interested. Our act of Assembly of 1846, ch. 27, renders him incompetent as a witness in any case in which a *white* person is interested; the old act of 1717, ch 13, confined it to cases in which a *christian* white person was concerned. The other case is, where the question is freedom *vel non*; there his color raises a presumption against him, and casts upon him the *onus* of proof of his freedom. From the earliest history of the colony, free negroes

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have been allowed to sue in our courts and to hold property, both real and personal, and at one time, they having the necessary qualifications, were permitted to exercise the elective franchise. To deny to them the right of suing and being sued, would be in point of fact to deprive them of the means of defending their possessions, and this, too, without subserving any good purpose to the rest of the community. Neither the policy of our law, nor the well-being of this part of our population, demands the principle of exclusion contended for by the appellant, on the contrary, they are both opposed to it, and so long as free negroes remain in our midst a wholesome system induces incentives to thrift and respectability, and none more effective could be suggested than the protection of their earnings. The words, *free negro*, are not essential in the averments of the pleadings except in the case of a petition for freedom; in all others the word "*negro*" is sufficiently full in its description; it notifies the adversary party of the fact of color, and thus affords him an opportunity to show the condition of slavery, if such be the case, by pleading that disability.

*Judgment affirmed.*

(Decided June 15th, 1858.)

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### JAMES HOOPER vs. THE MAYOR AND CITY COUNCIL OF BALTIMORE.

A ship registered at the custom-house in, and *sailing out* of the port of Baltimore, owned by a *bona fide* and *actual* resident of Baltimore county, having his place of business, as a merchant, in the city, is not liable to pay taxes to the city for municipal purposes.

A vessel thus situated is not, within the meaning of the tax law of 1852, ch. 337, "*permanently located elsewhere within the State*" than at the *domicil* of the owner, but is subject to the general rule of the common law, that personal property has *no locality* other than that of the *domicil* of the owner.

By the laws of congress, the registration district of which Baltimore is the port of entry, is not confined to the limits of Baltimore city, and the fact

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that a vessel is registered at the custom-house in Baltimore, gives to the city no more right to tax her than to any other part of the district.

Statutes are to be construed in reference to the *principles* of the *common law*; it is not to be presumed, that the legislature intended to make any innovation upon the common law, further than the case absolutely requires, but the law rather infers, that the act did *not* intend to make any alteration other than what is *specified*, and besides *what has been plainly pronounced*.

#### APPEAL from the Superior Court of Baltimore city.

This is an appeal from a *pro-forma* judgment of the court below (*Lee, J.*) The question presented by the statement of facts is, whether a ship duly registered in and sailing out of the port of Baltimore, owned by a *bona fide* and actual resident of Baltimore county, having his place of business, as a merchant, in Baltimore city, is liable to city taxation?

\* The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BARTOL, J.

*S. T. Wallis and A. S. Ridgely* for the appellant:

The act of 1812, ch. 191, exempted licensed vessels from all taxes whatsoever, and by the 60th section of the act of 1841, ch. 23, vessels paying licenses to the general government were exempted from taxation for *county or city purposes*, but this exemption was repealed by the act of 1845, ch. 354, sec. 2, so far as respects taxation for *city purposes*. By the act of 1852, ch. 337, sec. 9, which, in this respect, is similar to the previous law of 1841, ch. 23, sec. 9, it is provided, that "all property owned by residents of this State, and *not permanently located elsewhere within the State*, shall be assessed to the owner in the county or city where he or she may reside," and the question in this case is, whether this vessel comes within the exception of property "*permanently located elsewhere within the State?*" It is admitted, that the owner is a *bona fide* and *actual* resident of Baltimore county, and the general rule of law that the *situs* of the owner's domicil is the *situs* of all *personal property* belonging to him, undoubtedly applies unless modified or repealed by the act in question. In

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*Story's Conflict of Laws*, secs. 379 to 382, the reason, policy and universality of this general doctrine is clearly stated, and has been fully recognised by this court in *Newcomer vs. Orem*, 2 Md. Rep., 305, and in *Chauvenet vs. The Commissioners of Anne Arundel county*, 3 Md. Rep., 264, which was a case in which the rule was applied in reference to taxation. In the cases of *Harvard College vs. Gore*, 5 Pick., 377; *Salem Iron Factory vs. Inhabitants of Danvers*, 10 Mass., 520; *Gray vs. Kettell, et al.*, 12 Mass., 162, and *Amesbury Woolen & Cotton Manf. Co., vs. Inhabitants of Amesbury*, 17 Mass., 462; it was held, that, as a general rule, the owner is taxable for personal property in the town in which he dwells, no matter whether such property be found in that town or any other, and that this general proposition is proved by the exception introduced into the tax laws of that State, which *expressly* make the owners of goods and merchandise, &c., who hire shops and stores, &c., and carry on their business in other towns than those in which they dwell, liable to be taxed for such goods in the towns where their business is negotiated. The language of their acts is, "that for such goods, &c., or other stock in trade including stock employed in manufactures, *ships or vessels* as are *sold, used or improved* in any towns, &c., other than where the owners thereof dwell, such owners shall be respectively taxed therefor in *such towns, &c.*, and *not where they dwell or have their home.*" The court will perceive that the language of this exception is clear and express, and entirely different from that in our act of 1852. In the cases of *The Draco*, 2 Sumner, 189, and *Leland, et al., vs. The Ship Medora*, 2 Wood. & Minot, 115, it was held, that the rule applies to the general transfer of property, according to the laws of the State, without regard to acts of Congress.

The question then recurs, what is meant by the words "permanently located elsewhere within the State?" It is supposed on the other side, that the fact, that the vessel was registered at the custom-house in Baltimore city, gives it a *permanent location* there. But this can have no such effect, for according to the existing laws of Congress, it could be reg-

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istered no where else, so long as the owner resides where he now does, (Acts of Congress of 1792, ch. 1, sec. 3; 1798 ch. 8, sec. 2, and 1850, ch. 27, sec. 1,) and by the act of 1799, ch. 22, sec. 10, the registration district of which Baltimore is the *sole* port of entry, is not confined to the limits of Baltimore city, but includes "Patapsco River, Turkey Point, Spes Utiae Island, and all the waters and shores on the west side of Chesapeake Bay, from the mouth of Magetty river, which shall not be included in the district of Havre-de-Grace." According to these laws the registry must be in Baltimore city, though the owner resides in Baltimore county, or any part of Anne Arundel, Howard or Harford counties embraced within the limits of the registration district. The registry cannot, therefore, be said to give the vessel a "*permanent location*" in Baltimore city. Ships and vessels are *in fact* permanently located nowhere, and there is no reasonable ground for presuming, in direct opposition to the fact, that they are to be held in law as located at the port of entry where they are registered or enrolled. The very purpose and objects of commerce forbid this. Registry and enrollment are for national purposes exclusively, and are so far from implying permanent location, that vessels registered and enrolled may lawfully leave the port to which they belong without ever returning to it again. They may, in fact, if they are enrolled vessels, be permanently located in another State, and carry on commerce exclusively in its waters. They may, if registered, sail altogether from and to the ports of another State. They are therefore, more properly than almost any other sort of chattels, within the reasonable rule in regard to taxation, that personal property follows the *situs* of the owner. If the rule were otherwise, the result would be to exclude all the citizens of Maryland from the privilege of being interested in the commercial marine of their chief port of entry, except upon the condition of contributing to pay the municipal debts of Baltimore city. In the case of *Hays vs. The Pacific Mail Steam Ship Company*, 17 How., 596, it was held, that the State of California had no right to tax a vessel, temporarily in San Francisco, engaged in lawful trade, and duly registered in the city

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of New York, where her owners resided, and it was there said, that the *situs* of such a vessel was her *home-port*, where she belonged and where the owners were liable to be taxed for the capital invested. But the circumstances of that case are entirely different from this, and even if the *situs* of this vessel could be said to be her home-port where her owners resided, it would not locate her in Baltimore city, any more than in any other part of the registration district of which Baltimore is the port of entry.

Again, various provisions in the acts of 1841 and 1852, show that the legislature did not intend to embrace such property as this within the words, "permanently located elsewhere within the State." We refer to the provisions of the 12th, 13th and 63rd sections of the act of 1841, and particularly to the 16th section, which makes the stock of *non-resident* stockholders, in banking or other moneyed corporations situated, for the purposes of taxation, *at the place at which the principal office* for transacting the business of such corporation is *situated*. There are also similar provisions in the act of 1852. See, also, the acts of December session 1841, ch. 281, 1843, ch. 289. Again, by the 2nd section of the act of 1841, Baltimore city is divided into various assessment districts, and this vessel would be returned by the assessors of that district in which the owner resided, if he resided in the city at all, though the vessel might, in fact, be in another assessment district, and if this is admitted, as it must be under the provisions of the 12th section of the same act, it is because the *situs* of the owner draws to it the personal property of the owner.

*H. R. Dulany and G. L. Dulany* for the appellee:

It is admitted that personal property, as a general rule, must be taxed where the owner resides, but it is insisted that such property, when "permanently located elsewhere within the State," must be assessed to the party by the assessors of that place in which it is situated. This position is based upon the 9th section of the act of 1852, ch. 337, which supersedes the corresponding section in the act of 1841, ch. 23. After making it the duty of the assessors to inform themselves, by all

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lawful means, of *all* the assessable property in their respective districts, and to value the same at its full cash value; this section enacts, that "all property owned by residents of this State, *and not permanently located elsewhere within the State,* shall be assessed to the owner in the county or city where he or she may reside." A similar exception as to the place of taxation of personal property generally, has been established by the legislatures of Massachusetts and New York. 5 *Sandford*, 44. 17 *Mass.*, 461. In this case the owner is a *bona fide* and *actual* resident of Baltimore county, but has *his place of business*, as a merchant, in the city, and the vessel is duly registered at the custom-house in, and *sailing out* of the port of, Baltimore. These facts, we insist, makes the vessel "*permanently located*" in that city, within the meaning of those terms, as they are employed in the acts of 1841 and 1852. Those words evidently apply to *personal property*, for in the 1st section of the act of 1841, they are used in immediate connection with goods, wares and merchandise; the language of that section is: "All real and personal property in this State, all chattels real and personal, all goods, wares and merchandises, and other stock in trade, at home, or *not permanently located elsewhere*." This clearly imports that *personal property* may have a *permanent location*, for the purpose of taxation, elsewhere than at the domicil of the owner, and that such was the meaning of the Legislature when they passed the law. What is meant by the general doctrine, that personal property has no *locality*? It does not mean that it has no *visible locality*, but it only refers to the law governing the *transfer* and *transmission* of such property. This is clearly stated in the sections in *Story's Conf. of Laws*, referred to on the other side. The word "*permanent*," in its literal meaning, signifies *continuance* in a place for a greater or less time. When applied to real estate, it includes the idea of immobility. Blackstone applies the term to a *rent*, which is an incorporeal hereditament, and if applicable to a *rent*, why may it not also be applied to *personal property*? The word is to be taken in connection with the context in which it is used. 1 *Kent*, 252. We do not contend that the fact of *registry*, alone, gives the

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right of taxation to the city, but the statement of facts includes the business residence of the owner in the city of Baltimore, and that the vessel is *trading* out of that port. The argument on the other side goes to the extent, and must go to the extent, of saying that a vessel is not susceptible of *location anywhere*. But this is not so. A vessel is not, like stock in a corporation, invisible and intangible, but can be seen, occupies space, is tangible and susceptible of being *located*. In the eye of the law it has a *local situs*, and if capable of having such a *situs*, that *situs* is the city of Baltimore, and it is there subject to taxation. The Supreme Court of the United States, in the case of *Hays vs. The Pacific Steamship Company*, 17 How., 596, clearly say, that the *situs* of a vessel is her *home-port*, and that she is liable to be taxed there—her home-port is her *situs* for the purpose of taxation. The home-port of this vessel is the port of Baltimore, and it is there she is “*permanently located*,” within the meaning of the tax laws of the State.

J. E GRAND, C. J., delivered the opinion of this court.

This is an appeal from a *pro forma* judgment of the Superior court for Baltimore city, on the following statement of facts:

“It is admitted in this case that the defendant is a *bona fide* and actual resident of Baltimore county, but having his place of business, as a merchant, in the city, and that this action is instituted to recover from him the sum of five hundred and five dollars, being the amount duly assessed in the city of Baltimore, as city taxes on the ship Anne E. Hooper, the property of the defendant, registered in the custom-house at said city, and sailing out of the port of Baltimore. It is agreed that the plaintiff is entitled to recover the said sum of money and costs, and that the court shall give judgment therefor, provided the court shall be of opinion that the said ship is lawfully to be valued to the said defendant, for the purposes of city taxation in the city of Baltimore, and that he may lawfully be compelled to pay city taxes upon the said ship, notwithstanding his residence in Baltimore county. It is further agreed that the plaintiff is not entitled to recover, and that the

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court shall render judgment for the defendant, with costs, provided the court shall be of opinion that the said ship should be valued to the defendant, and that he should be taxed thereupon in the county where he resides.

"It is agreed that either party may have an appeal from the judgment of the Superior court, and that the said court may make inferences of fact, in their discretion, from the facts herein stated. It is further agreed that the Court of Appeals may, in case of appeal, render such judgment upon this statement and such inferences, as they may deem according to law."

The question presented by this statement of facts is simply this: is a vessel owned under the circumstances detailed, liable to pay taxes, for municipal purposes, to the city of Baltimore?

It is claimed, on behalf of the city, that such liability exists because of the provisions of the act of 1841, chapter 23, sec. 9, and of those of the act of 1852, chapter 337, sec. 9. The words of the latter, so far as this question is involved—and they are the same as in the former act—are as follows: "All property owned by residents of this State, *and not permanently located elsewhere within the State*, shall be assessed to the owner in the county or city where he or she may reside."

It is urged that notwithstanding the owner of the ship Anne E. Hooper "is a *bona fide* and *actual* resident of Baltimore county," she is liable to taxation for city purposes, because she is registered in the custom-house at said city, and is "sailing out of the port of Baltimore," and because she is "*permanently located elsewhere within the State*" without the limits of Baltimore county, the domicil of her owner.

It was on the union of all these circumstances, and not on any one in particular, it was contended she was liable to city taxation. First, then, as to the effect of her registration at the custom-house, in Baltimore. We attach—and we also understood the counsel for the city to attach—but slight importance to this fact. Under the existing laws of Congress, so long as Mr. Hooper owns the vessel, and retains his residence in Baltimore county, she can be registered nowhere else than at the custom-house, in Baltimore city.

By the act of Congress of the 2nd of March 1799, entitled

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"An act to regulate the collection of duties on imports and tonnage," it is provided "that in the State of Maryland there shall be ten districts," and that "the district of Baltimore shall include Patapsco river, Turkey Point, Spes Utiae Island, and all the waters and shores on the west side of Chesapeake Bay, from the mouth of Magetty river, which shall not be included in the district of Havre-de-Grace; and a collector, naval officer and surveyor for the district shall be appointed, to reside at Baltimore, which shall be the sole port of entry." And by the act of Congress of December 31st, 1792, it is provided that every ship or vessel to be thereafter registered, "shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong at the time of her registry, which port shall be deemed to be that at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of such ship or vessel usually resides. And the name of the said ship or vessel, and of the port to which she shall so belong, shall be painted on her stern," &c.

Under these acts of Congress, it is clear that the Anne E. Hooper could only have been registered at the custom-house in Baltimore, and she, in consequence of such registration, was made to belong to that port, but the district of which that is the port, as is palpable from the language of Congress, is not confined to the limits of the city.

The circumstances principally relied upon by the city, were the fact of sailing out of the port of Baltimore, and that she was "permanently located" elsewhere than at the place of residence of the owner. If, in one sense, as was said in the case of *Hays vs. The Pacific Mail Steamship Co.*, 17 Howard's S. C. Rep., 596, a vessel engaged in foreign trade can have a domicil, it must be regarded as that of the home-port, which, as we have seen in the present instance, may extend over a much larger territory than the limits of the city; and it would therefore be just as proper for Baltimore county or Anne Arundel county, as for the city of Baltimore, to impose a tax for municipal purposes, for all of the one, and a part of the other, is embraced within the district of which the city of Baltimore

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is the port of entry. If, therefore, there was no other consideration affecting the case, the city would clearly have no right to tax, she being in no better condition than the other portions of the registration district. But, in truth, the whole question depends upon the meaning of the words of the act of 1852. It cannot be denied, nor was it, that as a general principle, all personal property, unless affixed to the freehold, is, in contemplation of law, without a location, *other* than the residence of its owner. Wherever he or she may reside, there is, by operation of law, located the property. In this particular the rule being different from that applicable to realty. In the one case the domicil of the owner determines the law, whilst in the other the law of the *rei sitae* governs. So universal is the recognition of this distinction, that it can scarcely be necessary to cite authorities in its support. It is the law of nations. Lord Loughborough, in *Sill vs. Worswick*, 1 Hen. Bl. Rep., 690, has said, "it is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner, both with respect to the disposition of it, and with respect to the transmission of it, either by succession or by the act of the party. It follows the law of the person. The owner, in any country, may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession." And Lord Chief Justice Abbott said: "Personal property has no locality. And even with respect to that, it is not correct to say that the law of England gives way to the law of the foreign country; but that it is part of the law of England that personal property should be distributed according to the *jus domicilli*." Justice Story, after treating of the history of this rule, in section 379 of his work on the *Conflict of Laws*, says: "If the law *rei sitae* were generally to prevail in regard to movables, it would be utterly impossible for the owner, in many cases, to know in what manner to dispose of them during his life, or to distribute

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them at his death, not only from the uncertainty of their situation in the transit to and from different places, but from the impracticability of knowing, with minute accuracy, the law of transfer," &c. Again: "Any change of place at a future time might defeat the best considered will, and any sale or donation might be rendered inoperative from the ignorance of the parties of the law of the actual *situs* at the time of their acts. These would be serious evils pervading the whole community, and equally affecting the subjects and the interests of all civilized nations. But in maritime nations, depending upon commerce for their revenues, their power and their glory, the mischief would be incalculable. A sense of general utility, therefore, must have first suggested the doctrine, and as soon as it was promulgated, it could not fail to recommend itself to all nations by its simplicity, its convenience and its enlarged policy." These references are abundantly sufficient to show the rule and its policy. They might be multiplied to almost any extent.

Although the general rule is as we have stated it to be, yet it is perfectly competent to the sovereign authority to abolish or modify it, and the question here is: has it been so modified as to bring this vessel within the taxing power of the corporation of Baltimore? The words of the act are, "All property owned by residents of this State, and not permanently located elsewhere within the State, shall be assessed to the owner in the county or city where he or she may reside."

Apart from the general principle to which we have adverted, it may be very properly doubted whether a vessel built for and actually employed in foreign trade, can be said to be "*permanently*" located any where. The idea of its *permanent* location is at war with the very purpose of its creation. Vessels are not constructed to rot at the wharf or dock, but to carry, from place to place, cargo; their very use necessarily implies transition—the absence of permanency of locality. Besides, under our act of Assembly, to take personal property out of the general rule, so far as taxation is concerned, it must be "*permanently located elsewhere within the State*" other than within the county or city of the residence of its owner. The

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ship in this case, clearly, is not permanently located "*within this State.*" Her mission is on the seas:—

"Her march is o'er the mountain wave,  
Her home is on the deep."

The desire on the part of the tax-payers of a city to subject the personal property of non-residents, who transact their business within its limits, to a proportionate share of its burdens, is far from unreasonable; but this desire cannot be gratified unless the legislative will allows it, and this permission is not to be gathered by conjecture, but from the plain and unequivocal language in which it should be expressed. In *Dwaris on Statutes* it is said, at page 695, "As a rule of exposition, statutes are to be construed in reference to the *principles* of the common law. For it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did *not* intend to make any alteration *other* than what is *specified*, and besides *what has been plainly pronounced.*"

If the legislature hereafter should deem it wise and just to subject property held as is the vessel in question to city taxation, it can adopt the policy of New York and Massachusetts, but until it does do so in plain and unmistakable terms, the courts must adhere to the long established doctrine.

Being of opinion that the vessel, Anne E. Hooper, is not liable to city taxation under the authority given in that event by the case stated, we reverse the judgment of the court below, and enter judgment for the appellant, with costs.

*Judgment reversed.*

(Decided January 6th, 1859.)

WELLERSBURG AND WEST NEWTON PLANK ROAD  
COMPANY *vs.* JOHN YOUNG.

In a suit in the name of a corporation to recover a subscription to its stock, the plaintiff offered in evidence *letters patent* issued by the Governor of Pennsylvania, creating and erecting certain named subscribers, and also those who shall afterwards subscribe, into a body politic, by the name of "The Wellersburg and West Newton Plank Road Company," with all the privileges incident to a corporation. It was also proved that subscriptions were made by, and certificates of stock issued to, various persons, and the defendant appeared to be a subscriber subsequent to the date of the letters patent, and that the road was constructed, and toll-gates erected, and tolls collected thereon. HELD:

1st. That these facts were some evidence that the plaintiff was an incorporated company for the purpose of constructing a *plank road* by means of stock, and that the charter gave authority to the company to take subscriptions for stock after its date.

2nd. The defendant's contract being a subscription for stock of the company, is a contract which was necessary and usual as means for carrying into effect the purposes of such a charter.

3rd. The letters patent having conferred the power of making such a contract in Pennsylvania, the act of 1834, ch. 89, sanctions the like power in Maryland.

4th. The letters patent sufficiently establish the *corporate existence* of the plaintiff, and the matters set forth and recited in them are to be taken as true, until the contrary is proved.

5th. The charter having given authority to take subscriptions, without specifying any *particular manner* in which it shall be done, and the defendant having offered no proof that the *mode adopted* in taking his subscriptions is at variance with any law applicable to the subject, the presumption is, that the contract was valid.

When its charter and valid statutory law are silent as to what contracts a corporation may make, as a general rule it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other.

The creation of a corporation for a specified purpose, implies a power to use the necessary and usual means to effect that purpose.

The act of 1834, ch. 89, is a general authority to any corporation not chartered by our State, to make contracts here which are necessary to carry into effect the purposes of the charter, and not prohibited by it, or by some valid law.

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## APPEAL from the Circuit Court for Allegany county.

*Assumpsit* brought on the 16th of December 1852, by the appellant against the appellee, to recover a subscription made by the defendant for eight shares of the stock of the plaintiff at \$25 per share. The declaration counts upon the subscription as a *promissory note* for \$200, payable by the defendant to the plaintiff on demand, and also as a *contract* to pay \$200 for eight shares of the stock bargained and sold by the plaintiff to the defendant. It also contains a count for money laid out and expended, and the *insimil computassent* count. Plea non *assumpsit*.

*Defendant's Exception.* The plaintiff, to maintain the issue on its part joined, offered in evidence letters patent issued by the Governor of Pennsylvania, under the seal of State, as follows:

"In the name and by the authority of the commonwealth of Pennsylvania, WILLIAM F. JOHNSON, Governor of said commonwealth, to all whom these presents shall come, sends greeting: Whereas an act of the General Assembly of the commonwealth, 'An act authorising the borough of Bolivar to dig a public well; in relation to State and turnpike roads, and to the pay of commissioners of Westmoreland county; incorporating the Wellersburg and West Newton Plank Road Company; empowering the Auditor General to examine the claim of Samuel Kerr; and relative to bridges in Lebanon county,' approved the fifteenth day of April, A. D., one thousand eight hundred and fifty, provides for the organization of a company by the name, style and title of 'The Wellersburg and West Newton Plank Road Company,' subject to all the provisions and restrictions of an act entitled 'An act regulating Turnpike and Plank Road Companies,' approved the twenty-sixth day of January, A. D., one thousand eight hundred and forty-nine, by which last recited act the Governor of this commonwealth is authorized and required to issue his letters patent under the seal of the State, in the manner and at the time therein specified; and whereas the stipulations, conditions and things in the said act regulating Turnpike and Plank Road companies, directed to be performed, have in all respects been

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fully complied with: Now know ye, that in pursuance of the power and authority to me given by law, I, the said WILLIAM F. JOHNSON, Governor of the said commonwealth, do, by these presents, which I have caused to be made patent and sealed with the great seal of the State, create and erect the subscribers to the stock of the said company for the number of shares by them subscribed, to wit:" (then follows 'the names of various subscribers, with the number of shares of each,) "amounting in the whole to two thousand and thirty-four shares, and also those who shall afterwards subscribe, into one body politic and corporate, in deed and in law, by the name, style and title of The Wellersburg and West Newton Plank Road Company, and by the said name the subscribers shall have perpetual succession, and all the privileges and franchises incident to a corporation; and the said subscribers, and those who shall afterwards subscribe, their successors and assigns, are generally to be invested with all the rights, powers and privileges, and to be subject to all the duties, requisitions and restrictions specified and enjoined in and by the said acts of the General Assembly, and all other laws of the commonwealth. Given under my hand and the great seal of the State, at Harrisburg, this fifth day of July in the year of our Lord, one thousand eight hundred and fifty, and of the commonwealth the fifty-fifth."

To the admissibility of this evidence the defendant objected, but the court (PERRY, J.,) overruled the objection, and permitted the same to be read to the jury, and to this ruling the defendant excepted.

*Plaintiff's Exception.* In addition to the letters patent, the plaintiff offered in evidence the subscription book containing the defendant's subscription, and the testimony of several witnesses, all of which is fully stated in the opinion of this court. The plaintiff then offered four prayers, the first of which was assented to by the defendant, and granted by the court, and the others were rejected. (These prayers need not be stated, as no decision was passed upon them by this court.) The defendant then offered a prayer which was granted, and is set out in the opinion of this court. To this ruling the plaintiff excepted, and the verdict and judgment being in favor of the defendant, appealed.

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The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*J. H. Gordon* for the appellant:

The subscription was declared on as a *promissory note*, and the case of *Turnpike Road vs. Hurtin*, 9 Johns., 217, fully sustains this position. The court below instructed the jury that there was *no evidence* that the plaintiff was authorised to enter into the contract sued on, and that their verdict must be for the defendant. In this instruction there was error. The *letters patent* are sufficient evidence of the corporate existence of the company, and the corporate powers of the company and the execution of the contract by the defendant, being proven by his admission, it establishes a *prima facie* indebtedness against the defendant. A debt due to an incorporated company will be presumed to have been contracted in the lawful course of business, until the contrary is shown. 2 Cowen, 664, *New York Firemen Ins. Co. vs. Sturges*. 7 Cowen, 540, *Ex parte Peru Iron Co.* 3 Wend., 94, *Barker vs. Mechanic Fire Ins. Co.* The case of *Agnew vs. Bank of Gettysburg*, 2 H. & G., 478, is precisely the same as this in principle. At the trial in that case, the bank produced in evidence the promissory note, and proved the endorsements, the demand and notice of protest, and then offered in evidence the patent from the Governor of Pennsylvania, which is in every material part, like the patent in this case. Upon that evidence the defendant prayed the court to instruct the jury that the plaintiff could not recover, which the court refused to do, and the Court of Appeals affirmed the judgment. It follows, therefore, that the granting of the defendant's prayer in this case was wrong, and the judgment must be reversed on that ground. The general doctrine, that a corporation can make no contract which is not necessary, either directly or incidentally, to enable it to answer the purposes of its charter, as stated in *Angel & Ames on Corp.*, 232, 234, 237, and in the case of the *Steam Navigation Co. vs. Dandridge*, 8 G. & J., 318, is in no way violated by the position assumed by the appellant. There is no evidence to show that the contract was outside of the cor-

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porate powers of the plaintiff. It appears from the charter that the company was authorised to *issue stock*, and the contract being for the sale of stock, it was within the express powers of the company. 9 *Md. Rep.*, 568, *Plank Road Co. vs. Hoffman*. The letters patent also show that the company was created for the purpose of making a plank road, and that the stock was subscribed as a part of its means of carrying on the object of its creation; that the subscribers and those who shall afterwards subscribe, are incorporated into one body politic and corporate, with all the privileges and franchises incident to a corporation. The other evidence shows that the road has been built and is now in use, having toll-gates erected thereon. All this is clearly *some evidence* that this contract was within the scope of its powers. *Angel & Ames on Corp.*, 110. 12 *Mass.*, 553, *Phillips' Academy vs. King*. 9 *Mass.*, 403, *Little vs. Obrien*.

*Thos. Devecmor and Geo. A. Pearre* for the appellee:

Corporations are not only incapable of making contracts, which are forbidden by their charter, but in general they can make none which are not necessary either directly or indirectly to effect the objects of their creation. *Angel & Ames on Corp.*, 232, 245. 8 *G. & J.*, 318, *Steam Nav. Co. vs. Dandridge*. In the absence of the charter, there was no evidence of the powers conferred by it. The letters patent only prove the *fact* that the appellant was a corporation, but with what powers, and whether ecclesiastical or lay, elleemosynary or municipal, does not appear. It does not even appear that it was authorised to construct a plank road, or indeed any road at all. The mere *name* is no proof of the objects for which it was created. The fact that the road was constructed, is no proof that it had power under its charter to construct it; and, indeed, it does appear that it exceeded its powers, because the charter in Pennsylvania could not confer power to build a road and erect toll-houses in Maryland. This being a foreign corporation, it lives and has its being in the State where it is created, and though this fact is not an insuperable objection to its power of contracting in another State, yet it must show that the law of

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its creation gave it authority to make such contracts. 14 *Pet.*, 129, *Runyan vs. Coster's Lessee, et al.* The *onus probandi* rests on the plaintiff to show the validity of this contract. In charters created by statute law, there are no implied powers. 13 *Pet.*, 587, *Bank of Augusta vs. Earle*. There is no proof in this case that this subscription was made *after* the company became a corporation, nor does it anywhere appear that *Shriver* had authority to make such a contract, and a corporation can only act through its agents. The statutes of Pennsylvania, referred to in the letters patent, are not produced, as they should have been, in order to show whether the company had complied with the restrictions and conditions of those laws. For these reasons we insist that there was no error in the action of the court below in granting the defendant's prayer.

ECCLESTON, J., delivered the opinion of this court.

This is an action of *assumpsit* which was tried upon the general issue.

For the purpose of proving the plaintiff to be a corporation, letters patent issued by the governor of Pennsylvania, were offered in evidence, to the admissibility of which the defendant objected, but the court permitted the same to go to the jury; and the defendant excepted. We are not, however, called on to revise that decision, inasmuch as there is no appeal on the part of the defendant.

The plaintiff also gave in evidence the following "subscription list, book or paper:"

"1850.—We, the subscribers, do hereby obligate ourselves, our heirs, executors and administrators, to pay to the Wellersburg and West Newton Plank Road Company, the sum of twenty-five dollars, for each share of stock respectively subscribed in said company, one dollar upon each share, part of said twenty-five dollars, being paid at the time of subscribing."

Then follows a list of subscribers names with the number of shares taken by each; the shares so taken amounting to 2746. In this list, the name of the defendant appears as a subscriber for eight shares. Some of the subscribers in this list are, but many of them are not, included in the names

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mentioned in the letters patent; the defendant being one of those not so included. Samuel W. Pearson is the last subscriber on the list whose name appears in the letters patent. After his signature there are twenty subscribers, the defendant being the eighteenth. Thomas J. McKaig and Wm. W. McKaig, are the last two. Each of them testifies, that his name signed to the said subscription list is in his handwriting. Wm. W. McKaig says his subscription was taken by Thomas Shriver, who then had the book—"that he paid for his stock so subscribed for, and received a certificate of stock from the plaintiff." This witness also states that the defendant subscribed when he did. T. J. McKaig says he "was present when the subscription to said stock was made by the defendant." This witness, likewise, testifies, that "the plaintiff made the plank road, from Cumberland to West Newton, in the years 1851 and 1852, at a cost of about one hundred and twenty thousand dollars, and has had toll-gates on the road in both States, and has been collecting tolls thereon ever since."

The testimony of Wm. Wickard is, that he subscribed for one share of the stock of the plaintiff, on which he paid one dollar in money at the time of subscribing. That Mr. Shriver, the president of the company, afterwards called on him to collect the instalments from the other subscribers in Cumberland, with the understanding, that he, the witness, was to receive as his compensation, a certificate for the share of stock for which he had subscribed. That he promised to collect the instalments from the subscribers in Cumberland, on this and the several subscription lists, and deposite the money collected in the Cumberland bank of Allegany, to the credit of the plaintiff; that some of the subscribers paid in full, others in part only. He called on defendant twice for his subscription—he thinks in 1851 or 1852—the defendant promised to pay it, but did not do so, he told witness he had not the money, and requested him to call again. Wickard says, the certificate for the share he subscribed for was issued to him, and he was paid in part for his services in money. That the plank road has been constructed from Cumberland to West Newton, about seventy miles in length. Part of the road, about seven

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miles, lies in Maryland, and the balance in Pennsylvania. The part in Maryland, has been constructed upon the bed of a turnpike known as the Cumberland and Somerset Turnpike Road.

Edwin T. Shriver testifies, that the plaintiff had an account in the Cumberland bank of Allegany, of which the witness was cashier; that the money collected by Wickard was deposited in said bank, to the credit of said plaintiff, and checked out by Thomas Shriver, as its president, and by the secretary of said company; that Thomas Shriver was actively engaged in performing his duties as president for nearly two years.

The witness, John Beall, says he subscribed for shares in the capital stock of said company, which he paid for, and obtained a certificate of stock from the company. The company purchased machinery from him, and his stock was paid for in that way.

Without offering any proof on his part, the defendant prayed the court to instruct the jury, "that there is no evidence in the cause to show, that the plaintiff was authorized to enter into the contract offered in evidence by the plaintiff in this cause, even if they shall believe that the same was executed by the defendant, and that therefore their verdict must be for the defendant." This prayer the court granted; to which ruling the plaintiff excepted. And by this appeal the subject is presented to us for revision.

The appellee insists, that the court were right in granting the prayer, because the charter of the corporation was not produced, and, in its absence, there was no evidence of the powers conferred by it. The letters patent, he says, only proved the fact, that the appellant was a corporation; but with what powers, or for what purposes does not appear. Nor does it even appear that the corporation was authorized to construct a plank road, or indeed, any road. The mere name is no proof of the objects for which the charter was designed. And the fact, that the road was constructed, is no proof that the company had power under its charter to construct it. And, indeed, it is evident, that its powers were exceeded, because the charter in Pennsylvania could give no authority to build a road and

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erect toll-houses, &c., in Maryland, where there is no act of the legislature granting the power to do so.

The appellee further insists, that conceding the charter gave the plaintiff authority to make such a contract in Pennsylvania, as that given in evidence, still it does not appear from the proof in the cause, that the plaintiff had authority to make the contract in this State. The view taken on this point, by the appellee's counsel, is, that although a charter granted by one of the United States may authorize the corporation to make contracts in that State, which are consistent with the design and nature of the corporate body, still, similar contracts, if made in a different State, cannot be sustained or enforced in the courts of the latter State; unless it is shown by the charter itself, that by the true construction of its language, it gave authority to make such contracts in the State where they are thus made.

In *Angel & Ames on Corp.*, 139, (*Ed. of 1832.*) whilst considering what contracts in general may be made by a corporation, they say, that "having been made for a *specific* purpose, it cannot only make no contract forbidden by its charter, which is, as it were, the law of its nature, but, in general, can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place, whether a power to make such a contract may not be implied on the part of the corporation, as directly or incidentally necessary to enable it to fulfil the purpose of its existence, or whether the contract is entirely foreign to that purpose." See 8 *G. & J.*, 318 & 319.

And at page 145, *Angel and Ames* say, "when the charter or act of incorporation, and valid statutory law, are silent as to what contracts a corporation may make, as a general rule, it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other. The

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creation of a corporation for a specified purpose, implies a power to use the necessary and usual means to effect that purpose."

The prayer of the defendant presents the question, whether there is any evidence tending to show, that the plaintiff had authority to enter into the contract sued upon?

The suit is instituted in the name of "The Wellersburg and West Newton Plank Road Company," which is the name of the corporation as appears in the letters patent, issued by the governor of Pennsylvania; in which he recites, that an act of the General Assembly of that State, "provides for the organization of a company, by the name, style and title of 'The Wellersburg and West Newton Plank Road Company,' subject to all the provisions and restrictions of an act, entitled 'An act regulating turnpike and plank road companies;'" and that "the stipulations, conditions and things in the said act, regulating turnpike and plank road companies, directed to be performed, have in all respects been fully complied with." And in the letters patent the governor declares, that in pursuance of the power and authority given to him by law, he does create and erect the subscribers to the stock of said company, and also those who should thereafter subscribe, into one body politic and corporate, to have all the privileges and franchises incident to a corporation; and the said subscribers and those who should afterwards subscribe, their successors and assigns, are generally "to be invested with all the rights, powers and privileges, with full force and effect, and to be subject to all the duties, requisitions and restrictions specified and enjoined in and by the said acts of the General Assembly, and all other laws of the Commonwealth."

It is also in proof, that the defendant subscribed for eight shares of stock; that sundry other persons were subscribers, some of whom paid in part and others in full; and that certificates of stock were issued by the plaintiff to some of those whose subscriptions were taken by Thomas Shriver, the president of the company, by whom the subscription of the defendant was taken.

The proof likewise shows, that the plaintiff constructed a

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plank road at a cost of about one hundred and twenty thousand dollars; and has, from the time of its construction, had toll-gates on the road, and has been collecting tolls thereon.

From the matters appearing in the letters patent, and shown by the proof, it surely is not an unwarrantable inference, that the plaintiff was created a body corporate, for the purpose of constructing a plank road by means of subscriptions for stock.

The letters patent declare in express terms, not only that those who were, at the date of the letters patent subscribers to the stock, but also all those who should afterwards become subscribers, should be one body politic and corporate. This necessarily gave the company authority to take subsequent subscriptions for stock. And the evidence before us justifies the inference, that the defendant was a subsequent subscriber. He is not mentioned in the letters patent, and his name and two others are the last three on the list given in evidence. It also appears, that the number of shares of stock taken upon the list, exclusive of the defendant's and the two subscriptions after his, exceed the number of shares mentioned in the letters patent, as having been subscribed for up to that time.

There is some evidence then, that the plaintiff was an incorporated company, for the purpose of constructing a plank road by means of stock, and that the charter gave authority to the company to take subscriptions for stock after the date thereof. There is also some evidence, that the defendant and others did take stock from Thomas Shriver, the president of the company, after the corporation had been created. The defendant's contract thus being a subscription for stock of the company, is a contract which was necessary and usual, as means for carrying into effect the purpose of such a charter.

Under such circumstances we cannot say the court below did right in granting the defendant's prayer.

The defendant's counsel have contended, that supposing the letters patent and the other evidence might be sufficient to show authority in the plaintiff to make this contract in Pennsylvania, still, it is necessary to show, that it could be made in Maryland, and the plaintiff has failed to do so. We think, however, that the letters patent conferred the power of mak-

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ing such a contract in Pennsylvania, and that our act of 1834, ch. 89, sanctions the like power in Maryland.

The 1st section of that act provides, "that any insurance company not chartered by the laws of this State, which shall effect or shall have effected insurance upon any property real or personal, or upon life or lives, within this State, and *any corporation not chartered by the laws of this State*, which shall transact or shall have transacted business within this State, shall be deemed to hold and exercise franchises within this State."

The 2nd section makes provision for instituting suits, in the courts of our State, against such corporations, "upon contracts of insurance on property or lives within this State, or on *any dealing or transaction in this State.*"

This act is a general authority, (if such authority did not exist before,) to any corporation not chartered by our State, to make contracts here, which are necessary to carry into effect the purposes of the charter, and not prohibited by it or by some valid law. And we are of the opinion, that under the present charter, the act of 1834, authorized the plaintiff to take subscriptions for stock in Maryland; we not being aware of any rule of law, or act of our legislature, in any manner applicable to such contracts, or to the charter of the plaintiff, which denies the right to make such contracts.

When speaking of the effect of this Maryland statute, in delivering the opinion of the Supreme Court, in the case of the *Bank of Augusta vs. Earle*, 13 Pet. Rep., at page 592, Chief Justice Taney says, "by a law passed in 1834, that State has prescribed the manner in which corporations not chartered by the State, 'which shall transact or shall have transacted business' in the State, may be sued in its courts upon contracts made in the State. The law assumes, in the clearest manner, that such contracts were valid, and provides a remedy by which to enforce them."

The appellee says, the plaintiff was bound to produce the act of the General Assembly of Pennsylvania, which provides for the organization of the company, and, in its absence, the court was right in instructing the jury, that there is no evi-

dence to show the plaintiff was authorized to enter into the contract.

It will now be proper to inquire whether the plaintiff was bound to produce the act, as insisted upon by the appellee, or whether the production of the letters patent is not sufficient to sustain the contract, without showing the act itself.

In *Agnew vs. The Bank of Gettysburg*, 2 H. & G., 478, the bank brought an action of *assumpsit* on a promissory note, which was tried upon the general issue of *non-assumpsit*. After all the evidence had been given the defendant prayed the court to instruct the jury, that from the evidence offered the plaintiff was not entitled to recover. This prayer was refused, and the appellate court affirmed the decision.

The defendant contended, that under the general issue the plaintiff was bound to show its corporate existence; and that the evidence adduced for that purpose was insufficient.

No proof of the charter or act of incorporation was produced, except letters patent issued by the governor of Pennsylvania, creating the corporation, in a manner very similar to that made use of in the present instance. The court admitted that, on the general issue, the action could not be maintained, unless it was shown that by law the plaintiff had been effectually created a corporation. But it is manifest, that the letters patent were considered as sufficient evidence that the bank was duly incorporated.

It was urged in argument on the part of the defendant, that the evidence offered to prove the corporate existence was insufficient, because the act of the legislature of Pennsylvania, under authority of which the governor professed to have acted, should have been produced. The recital in the letters patent, it was contended, did not prove the existence of the law; and admitting the law to exist, still, as the governor had a specially delegated power, it was necessary that the power should be strictly pursued: and the court could not decide whether it was so pursued or not unless the law was before them. And as it was not recited in *haec verba*, the governor may have misconstrued the law.

In answering these views, the court say on page 494, "but

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in any aspect which can be given to the case, can this act of the governor be classed among the cases of special authorities, and subjected to all the limitations and restrictions which judicial determinations have put upon the execution of such power? It is on his part neither the exercise of a judicial or ministerial authority, but the fulfilment of a high executive trust and confidence; and it would certainly be demanded by that comity which is due from one sovereign State to another, that we should presume, until the contrary is proven, that the public acts of the chief magistrate of such State, purporting to be in execution of the laws, were legitimate acts, and within the scope of his powers as such officer, until the contrary is established by the proof of the laws themselves, by which it should be made to appear, that he had overstepped the boundaries prescribed to him."

By the decision in that case, the Court of Appeals held, that the matters stated in the letters patent were to be considered as true until the contrary should be proved; and that the letters patent were sufficient evidence of the corporate existence of the Bank of Gettysburg.

The letters patent, in the present case, must therefore be regarded as establishing the corporate existence of the plaintiff; and as there is no proof inconsistent with, or contradictory to the matters set forth in them, they are to be taken as true.

The record shows, that the first prayer of the plaintiff was granted by the court, with the consent of the defendant. In this prayer the portions of evidence intended to show, that the plaintiff had given authority to Thomas Shriver to obtain subscribers, are stated, and the court is asked to instruct the jury, that if they believe the evidence therein stated to be true, "then they may also find that the said Thomas Shriver, and those who assisted him in taking said subscriptions, were authorized by said plaintiff to take said subscriptions." Consenting to the granting of this prayer is a concession that there was evidence, proper to be submitted to the jury, tending to prove that the plaintiff did authorize Thomas Shriver to take the subscription of the defendant.

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The charter, in general terms, gives authority to take subscriptions for stock, without specifying in what particular manner it shall be done. Nor has the defendant offered any proof, showing that the mode adopted by the company is at variance with any law applicable to the subject. Would it be proper in such a case, to decide "there is no evidence to show that the plaintiff was authorized to enter into the contract?" We think not; especially, when by signing the contract, the defendant has given his assent to the mode adopted by the company, to carry into effect the general power conferred by the charter. In *Angel & Ames on Corp.*, 144, it is said, "if a corporation is authorized to raise money on promissory notes for a particular purpose, or if, as is frequently the case with other than banking institutions, it may receive notes in the course of its proper business, evidence may be admitted in the one case in favor, and in the other against, the corporation, to impeach the notes, by showing that they were issued for another purpose, or received in the course of business improper or forbidden to it. As in ordinary cases, *ut res magis valeat quam pereat*, the presumption is always in favor of the validity of the contract; or, in other words, it will be presumed that the debt was due, or the note or other security given in the lawful course of business, until the contrary is shown."

For the reasons stated, we think the court erred in granting the defendant's prayer, consequently the judgment must be reversed and a procedendo awarded. This renders it unnecessary to say any thing in relation to the second, third and fourth prayers of the plaintiff.

*Judgment reversed and procedendo awarded.*

(Decided January 7th, 1859.)

**MICHAEL TRIEBER vs. WM. KNABE and EDWARD BETTS, Surviving Partners of HENRY GAHLE.**

A *piano-forte* belonging to a stranger, and hired to a *music teacher* boarding at a public hotel, and found in the hotel, and not being in use as an instrument of trade or profession, and there not being a sufficiency of other goods on the premises, is liable to be distrained for rent due by the hotel keeper.

The instruments of a man's trade or profession are not *absolutely* exempt from liability for rent, but only in case of their being in actual use, or when there is a sufficiency of other goods on the premises to meet in full the distress.

It is no objection to a prayer that it asks *less* from the court than the party offering it was, upon the facts of the case embodied in it, and left to be found by the jury, *entitled to*.

**APPEAL** from the Circuit Court for Allegany county.

*Replevin* brought on the 25th of March 1856, by the appellees against the appellant, to recover a piano-forte alleged to be the property of the plaintiffs.

*Exception.* The case was tried upon an agreed statement of facts, which with the prayer of the defendant rejected by the court, (PERRY, J.,) is sufficiently stated in the opinion of this court. To the rejection of his prayer the defendant excepted, and the verdict and judgment being against him, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*J. H. Gordon* for the appellant:

The general rule is, that the goods of a stranger upon the demised premises are distrainable. 3 *Kent*, 476. 3 *Burr.*, 1498, *Francis vs. Wyatt*. 4 *Term Rep.*, 568, *Gorton vs. Falkner*. 6 *H. & J.*, 498, *Ratcliff vs. Daniel*. 7 *H. & J.*, 58, *Cromwell vs. Owings*. *Ibid.*, 380, *Neale vs. Clautice*. A boarder having a private room in a hotel, is in the nature of a sub-tenant, and his property is, therefore, distrainable, and if he is entitled to claim an exemption for his goods, it can only extend to such property as is in his possession, and necessary

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for his use as a boarder, and not furniture and other articles usually furnished by the hotel keeper. 1 *Hill*, 565, *Matthews vs. Stone*. The piano, in this case, was out of the possession of Stinebrecker, and in the family room of the tenant, where it had remained from November till February, and is therefore liable to distress. 17 *Wend.*, 358, *Gilbert vs. Moody*. 1 *Hill*, 568. The case in 1 *Hill* was afterwards reversed by the Court of Errors, in 7 *Hill*, 429, but under the New York statute, exempting property of boarders, and the decision of the Supreme Court is better authority than that of the Court of Errors, particularly as the latter court was divided upon that question.

This property does not come within any of the rules of exemption, and is therefore liable. 1 *Mees. & Wels.*, 647, *Muspratt vs. Gregory*, and same case in 3 *Mees. & Wels.*, 677. 7 *Mees. & Wels.*, 450, *Joule vs. Jackson*. 9 *Bing.*, 673. *Fenton vs. Logan*, in 23 *Eng. C. L. Rep.*, 417. 23 *Wend.*, 472, *Connah vs. Hale*. 17 *Wend.*, 358. The courts in some of the States have changed the common law rule by extending the cases of exemption, but by our Declaration of Rights, art. 3, we are governed by the common law, so far as it has not been changed by the legislature. The cases of *Brown vs. Sims*, 17 *Sergt. & Raole*, 138; *Riddle vs. Welden*, 5 *Whar.*, 1; *Butler vs. Morgan*, 8 *Watts & Sergt.*, 53, show that the courts of Pennsylvania have abandoned the common law rule. The case of *Stone vs. Matthews*, in 7 *Hill*, 429, as already stated, was under the New York statute, exempting property of boarders in a boarding-house.

*Thos. Devecmon* for the appellees:

1st. It is not denied that, in general, all goods found upon the demised premises are liable for the rent, but to this rule there are various exceptions. Articles that may be temporarily placed upon the premises by way of trade, and belonging to third persons, are exempted from distress upon the broad principle of public convenience, and for the benefit of commerce. The fact that the piano was in the actual use of the keeper of the hotel by the boarder's consent, does not at all vary the

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principle. Upon *principle* this fact could not vary the question, for if the exemption exists at all, it is absolute, and does not depend upon any condition that the guest or boarder shall retain the *actual possession*. So, also, the fact that the piano was in the possession of the agent of the plaintiffs, does not affect the question. The agent being in possession, and being a guest, entitles the plaintiffs to the benefit of any exemption which the guest, their agent, was entitled to. In support of these views, reference is made to the following authorities: 3 Kent, 477, and note (c.) 5 Whart., 1, *Riddle vs. Welden*. 7 Hill, 429, *Stone vs. Matthews*. 2 McCord, 39, *Youngblood vs. Lowry*. 17 Sergt. & Rawle., 139, *Brown vs. Sims*. 4 McCord, 552, *Walker vs. Johnson*. 22 Maine, 47, *Owen vs. Boyle*. 23 Wend., 463, *Connah vs. Hale*. 5 Blackford, 489, *Harris vs. Boggs*. 1 Smith's Lead. Cases, 187, 454. 3 Brod. & Bing., 75, *Gilman vs. Elton*. 1 Bing., 283, *Thompson vs. Mashiter*. 1 Eng. Law & Eq. Rep., 373, *Brown vs. Arundell*. 20 Eng. Law & Eq. Rep., 370, *Williams vs. Holmes*. 6 H. & J., 47, *Towson vs. Havre-de-Grace Bank*.

2nd. The court was right in refusing the instruction asked, for the reason that it submits a question of law to be found by the jury. It asks the court to say to the jury, that if they find the facts agreed upon, then they *may also find* that the goods in question were *liable to distress*.

LE GRAND, C. J., delivered the opinion of this court.

This is an action of replevin, and comes before us on the ruling of the court below on an agreed statement of facts. The suit involves the title to a piano. The facts agreed upon, which are material to be stated for the decision of this case, may be thus enumerated: The piano in controversy belonged to the plaintiffs, and was by them hired to one Stinebecker, a music teacher, in Cumberland, in the summer or fall of the year 1854; Stinebecker boarded and lodged with one Helffinger, the keeper of the "Revere House," and the tenant of the defendant. The "Revere House" was a public hotel. After the piano had been for some time in the room occupied by Stinebecker, in consequence of his removal to a smaller

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room in the hotel, the piano was removed to the private family room of Helfsfinger, and there remained until, in the month of February 1856, it was taken by virtue of a distress for rent due from the tenant, Helfsfinger, to his landlord, the defendant. It is admitted the distress was in due form, and also "that all the property on the premises at the time of the distress, and liable to be distrained, was not sufficient to pay the whole rent" due. The piano was sold under the distress warrant, and the defendant became the purchaser of it.

The question which arises on this state of facts is, was the piano, so circumstanced, under the law, exempt from liability to distress for rent? We are of the opinion it was not.

We have carefully examined the cases referred to by counsel in argument, and duly weighed the reasons addressed to our judgments, but in neither do we discover any justification for us, as a court in Maryland, to decide in favor of the exemption of the piano from liability. As a general principle, all movables found on the demised premises are subject to distress. To this there are, however, some exceptions, and the question in the present case is, does this piano, under the circumstances, fall within any of these exceptions? In the case of *Simpson vs. Hartopp, Willes*, 512, Lord Chief Justice Willes, in an opinion of clearness and precision, lays down the whole law as applicable to what is, and what is not, liable to distress. After stating the general principle, he proceeds as follows to state the exceptions to it:

"1st. Things annexed to the freehold.

"2nd. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ.

"3rd. Cocks or sheaves of corn.

"4th. Beasts of the plough, and instruments of husbandry.

"5th. *The instruments of a man's trade or profession.*

"The first three sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides. The last two are only exempt *sub modo*; that is, *upon a supposition that there is sufficient distress besides.*"

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From the rendition of the judgment in *Simpson vs. Hartopp*, to the present time, the correctness of the opinion of the court therein has never been questioned, so far as we know, either in England or this country. The most that has been contended for is, that within the reason and principles of that decision, the courts are authorized, with a view to the public good and convenience, to embrace within the exceptions to the general rule a large class of cases in which there would be great hardship and serious interruption to the safe dealings of the community, if they were not so included. We are free to confess this view has been enforced with a good deal of sound reasoning and good sense. It rests mainly on the *quasi* feudal origin of the right of distress, the change in the business and intercourse of the world since distress became a part of the law of landlord and tenant, and the facilities which an enlightened policy should afford to the meritorious pursuits of life. This aspect of the question the curious will find very forcibly put by Baron Parke, in *Muspratt vs. Gregory*, 1 *Mees. & Wels.*, 650; by Justice Bay, in *Youngblood vs. Lowry*, 2 *McCord*, 39; and by Chief Justice Gibson, in the case of *Riddle vs. Welden*, 5 *Whart.*, 1. We refer to these opinions as embracing all which, perhaps, could be urged in furtherance of the widening of the circle of exemption. But, as we have already in effect said, we cannot judicially, in the present state of the law of Maryland, give our assent to them.

If the present case can be brought under any of the heads or classes of exempted articles specified by Lord Chief Justice Willes, it must be under the 5th, which is, "*the instruments of a man's trade or profession.*" Now we have seen this freedom from distress is not absolute, but dependent on circumstances which are not in this case, *the article was not in use as an instrument of trade or profession, nor was there a sufficiency of other goods on the premises to meet in full the distress.* In the case before us, there is an absence of both of those ingredients. It is not shown, by the agreed statement of facts, that this piano, at the time of the distress, was in use as an instrument of profession, nor are we permitted, by the terms of the submission, to infer such use from the profession of music.

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teacher of the hirer; and, besides, it is expressly stated there was an insufficiency of other property on the demised premises to satisfy the rent due the landlord. This being so, the plaintiffs cannot bring themselves within any of the above enumerated exceptions. Nor do we think they can successfully avail themselves of the doctrine which protects the baggage of a *transient* boarder and lodger at a public inn. The only case which we have been able to find, in any way countenancing such a pretension, is the one to which we have referred, reported in 5 *Whart.*, 1. That, undoubtedly, goes the whole length of declaring the goods of a boarder are not responsible for rent due by the keeper of a boarding house. To the eminent jurist who gave that opinion, we are second to none in yielding the homage of profound respect, but, notwithstanding this, we are unable to find him supported either in England or in this country, and, as a consequence, we must adhere to what we consider the long and well-established doctrine; a doctrine which, it is apparent from the legislation of many of the States of the Union, and also of our State, (act of 1845, ch. 130,) the community recognized and acted upon. If anything were wanted to fortify the very able opinion in *Simpson vs. Hartopp*, it may be found in Lord Denman's opinion, in his review of the case of *Muspratt vs. Gregory*, 3 *Mees. & Wels.*, 677, (subsequently concurred in by Baron Parke, in *Joule vs. Jackson*, 7 *Mees. & Wels.*, 454,) and that of Chief Justice Tindal, in *Fenton vs. Logan*, 9 *Bing.*, 676, (23 *Eng. C. L. Rep.*, 416.)

If, as we have said in other cases of supposed hardship, the rules of the common law are found unsuited to a case like the present, the constitution has confided to another branch of the government the power of alteration—it is with the legislature.

There was but one prayer submitted in the case, and that by the defendant, which was refused by the court. It is as follows: "If they (the jury) shall believe all the matters agreed upon in the agreement now in evidence before them to be true, then they may also find that the piano-forte now in question was liable to distress for the rent of said Treiber, and that said piano-forte was legally sold to Treiber, under said

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distress, and if they do so find, then their verdict ought to be for the defendant."

It is objected to this prayer, on behalf of the plaintiffs, that it is defective in submitting a question of law to the jury, and this defect is supposed to consist in the use of the words, "they (the jury) *may* also find that the piano-forte, now in question, was liable to distress from rent," instead of the words, "they *shall* find," &c. It is clear from what we have said, that in our opinion the plaintiffs, on the facts in the case, ought not to maintain their action, and surely it is a strange objection to urge against the defendant that he asked *less* from the court than he was entitled to. We perceive no force in the objection. We reverse the judgment.

*Judgment reversed and procedendo awarded.*

(Decided January 11th, 1859.)

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## WILLIAM FISHER vs. HENRY RIEMAN, ALEX. RIEMAN and Jos. H. RIEMAN.

Where a promissory note is *bona fide sold* by a public bill and note broker, by delivery merely, without endorsement, or any express warranty or representation, the broker acting as agent, but not disclosing the name of his principal, and no debt being due the purchaser, or created at the time, the latter cannot recover from the broker the money paid for the note, though the names of the maker and one of the endorsers thereon proved to be *forgesies*.

In such case, there is no implied warranty of the *genuineness* of the note, but the law respecting the *sale of goods* is applicable. The only implied warranty is, that the broker owns, or is lawfully entitled to dispose of, the paper.

**APPEAL** from the Superior Court of Baltimore city.

*Assumpsit* brought by the appellees against the appellant, to recover back money paid by the plaintiffs to the defendant, for a promissory note. The defendant was a public bill and note broker, and *sold* the note in question to the plaintiffs,

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without disclosing the name of his principal. The names of the maker and one of the endorsers on the note proved to be forged, but this fact was not known by the defendant at the time of the sale. The signature of the other endorser was genuine. The declaration contained the common money counts. Plea, *non assumpsit*.

The facts of the case, and the prayer of the plaintiffs, which was granted by the court below, are fully stated in the opinion of this court. The defendant offered three prayers, which were rejected, and they need not be stated, as no opinion was pronounced upon them by this court. The following opinion was delivered by the court below (LEE, J.) upon granting the plaintiffs' prayer:

"This is an action to recover from the defendant, William Fisher, a sum of money, which the plaintiffs paid for a promissory note sold to them by the defendant, and they seek to recover it back, on the ground that the note, when sold, was not genuine, the name of the drawer and one of the endorsers being forged; and, upon the trial, the plaintiffs to support the issue on their part, produced the promissory note, purporting to have been made by Edward Dunn in favor of Jacob F. Kridler, and endorsed by said Kridler and Henry Shirk, for \$861, payable eleven months after date, and dated Baltimore, February 1st, 1854. They further proved, by a competent witness, that they purchased said note from the defendant Fisher, who was a public bill and note broker in the city of Baltimore, (and who dealt in having notes discounted or sold,) for the sum of \$651.08; and also proved that the defendant was generally known in the city as a public bill and note broker, largely engaged in the selling of bills, notes and stocks, and that the plaintiffs had frequently bought the promissory notes of other persons from said defendant before the purchase by the plaintiffs of the note in this case; that the defendant was in the habit of bringing to the counting-room of the plaintiffs a large number of notes at a time, for the purpose of selling them to the plaintiffs before the sale of the note in question. And the plaintiffs further proved by Edward Dunn and Henry Shirk, that their names written upon the said note, as maker and en-

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dorser, were not in their handwriting, but were forged; but that the name of Jacob F. Kridler, written in two places on the back of said note, was his genuine handwriting, and that Kridler was a man in good credit in the city of Baltimore, down to the 27th of November, 1854, when he absconded, having committed other forgeries; and that said Kridler left some property behind him, upon which there are mechanics' liens.

"The defendant, on his part, gave in evidence, by a competent witness, (his clerk,) that at the time of the sale by the defendant to the plaintiffs, of the note in question, Kridler was in the habit, before this time, of putting into the hands of Fisher, as a bill and note broker, for the purpose of sale on account of said Kridler, various notes held by Kridler and endorsed by him, but the particular notes were not named or recollectcd by the witness; and also proved that the defendant is a public bill and note broker in the city, for all persons who may employ him for that purpose, handing over to such persons the proceeds of sale of such notes as he sells, less the commissions charged for such sales, and that the proceeds of the sale of the note now in question, were paid by the defendant to his principal who employed him to sell it, before the alleged forgery of the names of Dunn and Shirk, upon the said note was suspected, either by the plaintiffs or defendant.

"Upon these facts, the plaintiffs by their counsel, asked an instruction from the court, that they were entitled to recover in this suit, and counter-instructions were prayed by the defendant.

"I am aware that the question is an interesting one, and for the first time raised in this State, as to the liability of a public note or bill broker for the genuineness of a note or bill sold by him, he at the time being ignorant of the fact; in other words, both the plaintiffs and the defendant in this case are shown to have been innocent parties, and ignorant of the forgeries on the note in question at the time the sale of it was made. Who shall, in such a case as this, bear the loss?

"It has been contended at the bar, that the defendant, a public bill broker, should be regarded as the principal, or that in

selling the note, even as agent, there was, on his part, an implied warranty to the vendees, (the plaintiffs,) of the note being what it purported to be, a valid and genuine note; that the sufficiency, or solvency, or ability of the parties to the note, was the risk which the vendees encountered, but in the event of the note being false and forged the vendor should bear the loss.

"On the other hand, it is insisted by the defendant that, as the plaintiffs in this case had dealt with him as a broker, and knew the business which he was engaged in, which was the disposing by sale of notes on account of other parties, they should have known or presumed he was an agent, and acted with him as such in the sale of notes.

"English and American authorities have been cited, which, I think, apart from a sound rule of public policy, determine the liability of the proper party here; and, without referring particularly to all the authorities, I will name the last leading case in England, of *Gurney, et al., vs. Womersley, et al.*, decided as late as November 1854, by the court of Queen's Bench, in which Lord Campbell decides, that the vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness; and if it turns out that the name of one of the parties to it is forged he is liable to the vendees.

"The defendants in that case were bill brokers, who received the bill to be discounted, and took it to the plaintiffs, who were money lenders, with whom the defendants, as bill brokers, had previously had similar dealings. The defendants did not disclose their principal, and were regarded as principals; and it was held by the court, all the judges concurring, that they were liable, and the plaintiffs should recover back the amount paid by them for the forged bill. Lord Campbell, at page 259 of vol. 28, of *Eng. Law and Eq. Rep.*, says:

"'Here that which *purported* to be the acceptance of one of the parties to the bill, and upon which the plaintiffs gave credit and relied, was a forgery, and of no value whatever; in fact, the instrument altogether became of no value, for Anderson was a bankrupt. There was, therefore, clearly a failure of consideration entitling the plaintiffs to recover.'

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"The case at bar is like the case decided by Lord Campbell, and the same rule should apply, in my opinion, to its determination.

"No decision in England, before or since, is in conflict with that decision; and I will now refer to one or two American cases, read at the bar, from which it will be seen that, except the case of *Baxter vs. Duren*, in 29 *Maine Reports*, (chiefly relied on by the defendant here,) no authority can be found to impair or conflict with the judgment of Lord Campbell. In the case of the *Canal Bank vs. The Bank of Albany*, 1 *Hill Sup. Court Report of New York*, page 290, Judge Cowan in substance affirms the doctrine established by Lord Campbell, and says: 'No doubt the parties are equally innocent in a moral point of view. It was the duty, or more properly a measure of prudence, in each to have inquired into the genuineness of the note. They (the defendants) have obtained the plaintiffs' money without consideration, and the plaintiffs have a right to recover, (though there was ignorance on both sides of any forgery.)' That was a case of forged bank notes passed by the defendants to the plaintiffs. Other decisions in Massachusetts and New York sustain the same view. But the case of *Baxter vs. Duren*, 29 *Maine*, 440, is invoked to establish a different rule from that laid down by Lord Campbell, and confirmed by many American authors. (See cases referred to in *Story on Bills*.) With entire respect for the court, it will be found, on examining the authorities upon which it rests its decision in *Baxter vs. Duren*, at page 441, that they do not sustain the doctrine of the learned Judge, viz., 'that where no debt is due or created at the time, and the paper is sold as other goods and effects are, the purchaser cannot recover from the seller the purchase money. There is in such case no implied warranty of the genuineness of the paper; the law respecting the sale of goods is applicable; the only implied warranty is, that the seller owns or is lawfully entitled to dispose of the paper or goods.' If this be the true rule, which I respectfully submit cannot be sustained by authority or on principles of public policy, then in no event could a bill broker be liable, either as principal or agent, if no implied

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warranty attaches, unless where the note is paid away for a previous debt or in payment of goods, &c.

“*A public broker, like the defendant in this case, must be regarded as the principal in all his business transactions, unless he discloses his agency at the time.* How is he otherwise an agent, and whose agent is he? To illustrate the force and justice of this doctrine, as sanctioned by the court of Queen’s Bench and by Justice Story, suppose a bill broker sells a coupon bond, for instance, which is transferred by delivery only, without an endorsement or formal transfer, and it turns out to be a forgery, can it be maintained that he is not responsible for the genuineness of the bonds; and can the fact of his being known to be a general agent relieve him, if at the time of the sale he did not disclose the principal or party for whom he was agent in this particular transaction? The answer is conclusive, and his liability certain. To relieve himself, therefore, in a case like this, from responsibility, he should have disclosed his principal. This can be the only safe rule, which, it will be found, is sanctioned by Judge Story, in his learned works on promissory notes and agency. A contrary doctrine, carried to the extent of the case in *Baxter vs. Duren*, in 29 *Maine Reports*, would open the door to fraud, gross injustice, and commercial inconvenience.

“Judge Story, in his admirable treatise on Promissory Notes and Bills of Exchange, at page 132, forcibly states the doctrine as it now stands supported by the highest authority in England and this country, and by principles of sound reason and public policy. He says:

“‘Unless it be expressly otherwise agreed, the holder transferring a note is not exempt from all obligations and responsibilities, but he incurs some, although they are of a limited nature.’

“In the first place, *he warrants by implication* (unless otherwise agreed) that he is a lawful holder, and has a just and valid title to the instrument, and a right to transfer it by delivery, for this is implied as an obligation of good faith. In the next place, *he warrants in like manner that the instrument is genuine, and not forged or fictitious.* (It will be found

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stated, not as a part of the learned author's text but inserted by the editor in brackets, that the case of *Baxter vs. Duren*, in *Maine Reports*, has decided otherwise. But Judge Story does not adopt or sanction the decision; on the contrary, refers in the notes to his work to authorities directly in conflict with it.)

"The case of *Baxter vs. Duren*, 29 *Maine Rep.*, was decided after Judge Story's death; and the reference to this case at sec. 118 of *Story on Promissory Notes*, (New Edition) is marked by brackets, and Mr. Charles Sumner, the Editor of this edition in 1851, says, 'the present edition contains the authorities furnished by cases decided since the publication of the 2nd edition—the new matter now introduced, (except merely the names of additional cases,) is marked by brackets.'

"And to the advertisement of the 2nd edition, Mr. W. W. Story (the son of the eminent Judge) states, in 1847, 'that the present edition is a re-print of the former edition, except that the manuscript notes left by the author—and the late cases arising in the law applicable to *promissory notes*—have been added by the Editor.'

"The cases of *Fenn vs. Harrison*, 3 *Term Rep.*, 757, and the *Bank of England vs. Newman*, 1 *Ld. Ray.*, 442, (referred to in *Chitty on Bills*, 245,) as also the American case of *Ellis vs. Wild*, 6 *Mass. Rep.*, 321, relied on by the Judge in 29 *Maine Rep.*, will be found to depend on a very different state of facts from the case at bar, and can not sustain the doctrine, that the vendor is not liable to the vendee, upon the sale of a forged or fictitious note or bill. In none of those cases were the notes *invalid* (or not *genuine*, except in the case in 6 *Mass. Reports*, which, however, turned on the plaintiffs having *agreed* to buy the notes in question, by giving a quantity of merchandize (rum) for them.

"Hard as in the present case the rule may operate, yet it is the *only* one which can determine with safety the duties and obligations of parties to a transaction like this. If the plaintiffs and defendant acted, as is conceded, in good faith and in ignorance of the forgery, then the loss must fall on the vendor. He is nearest the inception of the transaction, and, if acting as

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principal, must be clearly *liable*, if he disposes or sells an invalid bill or forged note; or, if acting as agent, he must be presumed to know the party who employed him, and the circumstances of the case; at all events, as principal or agent, he comes under an implied guaranty or warranty, to the vendee, of the *genuineness of the paper sold*, unless he discloses at the time his principal, if he acts as an agent.

"Entertaining these views, I am of opinion that the defendant is liable in this action, and that a verdict ought to be entered for the plaintiffs and therefore grant the plaintiffs' prayer."

The verdict and judgment were in favor of the plaintiffs, and the defendant appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and BARTOL, J.

*Wm. A. Fisher and St. G. W. Teackle* for the appellant:

1st. The note in this case was *sold* by the appellant, a public bill and note broker, without solicitation. The appellees *purchased* it upon the strength of the names appearing upon its face, and not upon the credit of the seller. Each party was ignorant of the *forgery*, and the loss must fall on the holder; for, as we insist, there was no contract, *express* or *implied*, by which the seller could be held liable to the purchasers—there was no *priority* between them. A bill and note broker is not bound by the ordinary rule of agency in the sale of property, where the actual owner is concealed. As a general rule, an agent failing to disclose the name of his principal, is personally responsible on a contract made by him, (*Story on Agency*, sec. 267,) but a *broker* is a mere negotiator between other parties, and never acts in his own name, but in the names of those who employ him—he is strictly a middle-man, or intermediate negotiator between the parties, (*Story on Agency*, sec. 28,) and when a party deals with such *broker*, he knows that he is dealing with one who, from the nature of his business, is acting for those who employ him. In the authorities cited by the appellee, the court will find that no question of *agency* was presented. There is *now* no such thing as *agency* in the

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bill brokers' business in London—they are *there* capitalists, who deal wholly on their own credit, and sales by *them* are contracts between the purchasers and the brokers as principals. 82 *Eng. C. L. Rep.*, 135, *Gurney vs. Womersley*, shows this, and also establishes the further proposition, that if the brokers had sold as *agents*, they would not have been held liable. In that case the seller received the proceeds of sale, while here the purchasers dealt with the broker as an agent *selling on agency*, whose principal received the proceeds. In *Jones vs. Ryde*, 5 *Taunt.*, 488, the defendants *discounted* the bill with the *brokers*, who acted for themselves as principals, and therefore a *loan or debt* was created at the time, which is another distinction to be observed in the cases. Where the bill or note is passed in *payment* of an antecedent or pre-existing debt, or where it is *discounted*, or, in other words, where a loan or debt is created *at the time*, and by the transaction itself, the broker would be responsible. But here there was no express warranty or representation, and no debt existing, in *payment* of which the note was received, nor was any *loan* made or *debt* created at the time. It was a simple *sale*, and not a *discount*, and the note was passed by *delivery* merely, without *endorsement*. The case of *Baxter vs. Duren*, 29 *Maine Rep.*, 434, reviews all the cases, and lays down the rule, showing that in the *sale* of a bill or note by a public bill and note broker, where he acts as agent, no warranty of the genuineness of the paper is implied, and that such warranty is only implied where the note has been delivered in *payment* of a pre-existing debt, or where a loan or debt is created at the time. No case can be found where a broker, selling a note *bona fide* and paying the proceeds over to his principal, has been held answerable for a failure of consideration for *forgery* or *otherwise*. In such a case, the law applicable to the *sale* of goods applies. *Story on Prom. Notes*, sec. 118, (*New Ed.*) *Chitty on Bills*, 246. 6 *Mass.*, 321, *Ellis vs. Wild*. 3 *Burr.*, 1354, *Price vs. Neal*. 3 *Term Rep.*, 759, *Fenn vs. Harrison*. *Ryan & Moody*, 49, *Fuller vs. Smith*. *Chitty on Cont.*, 622. 2 *Caines' Cases*, 48, *Sexias vs. Wood*. 1 *Wend.*, 185, *Welch vs. Carter*. 2 *Espinse*, 572.

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2nd. But if the above position should be decided adversely to the appellant, still the judgment must be reversed upon his *second* and *third* prayers, because there was not a *total* failure of consideration. The action is for money had and received, and to recover under it, there must be a total failure of consideration. The case of *Gurney vs. Womersley*, already cited, fully establishes this position. In that case the note was purchased solely on the faith of the endorser, whose name was forged, and hence there was a total failure of consideration, whilst in this it does not appear upon the strength of *which* name the purchasers bought, and the name of Kridler was genuine, and he was in excellent credit until long after this transaction. There could not have been, therefore, in this case, a total failure of consideration. On this point see, also, *Brown on Actions at Law*, 529, in 45 *Law Lib.* 5 *Humph.*, 496. 24 *Eng. Law & Eq. Rep.*, 156, *Gompertz vs. Bartlett*.

*Geo. W. Dobbin* for the appellees:

The appellant, though acting as a bill broker, was liable as principal to the appellees, not having disclosed, at the time of the sale, the fact of his agency, and the name of his principal, and is bound to refund the money paid him by the appellees for the note in question, because there was an implied warranty that the note was genuine, and also because there was a failure of consideration. It is a general principle of law, that money paid upon a consideration which has wholly failed, may be recovered back in an action for money had and received. This principle is not denied, and the effort on the part of the appellant, is to except this case from the general rule. The facts in the case show that the note was discounted as a bankable transaction, and that the names of the drawer and one of the endorsers thereon, were forgeries. This is such a failure of consideration as warranted the instruction given by the court below. If the article sold be not what it professes to be, the vendor is answerable over. Here the thing sold professed to be a promissory note, when, in fact, it never was such, because the name of the *drawer* was forged, as well as

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that of one of the endorsers. The note, in fact, never had a *drawer*, and, therefore, never was a promissory note. It was taken as a mere discount, and was discounted upon the strength of the written security on its face—the drawer and endorsers. This was what it was represented to be. If either name was forged, it was not what it purported, and was represented to be, and falls within the case of *Gurney vs. Womersley*, which decides that where a party's name is genuine, there is no implied warranty as to his *solvency*, but that there is such warranty that the name is genuine. All the authorities show that if the article sold be not what it purports to be, the warranty attaches. But it is said Fisher was a bill broker, and is not answerable as ordinary agents are. He is not exempt by law from any ordinary liability. His is not a branch of business more favored than any other. But, in fact, he does not appear here as a bill broker, but as a factor, and if he did not discover his principal, he is bound himself. Again, it is said there was but a partial failure of consideration. But Kridler became insolvent, his forgeries had been discovered, and he had run away before the maturity of the note, and left no redress against him; there was, in fact, a total failure of consideration. The following authorities fully sustain the positions here assumed. 5 *Taunt.*, 488, *Jones vs. Ryde*. *Ibid.*, 495, *Bruce vs. Bruce*. 1 *Carr. & Payne*, 197, *Fuller vs. Smith*. 24 *Eng. Law & Eq. Rep.*, 156, *Gompertz vs. Bartlett*. 82 *Eng. C. L. Rep.*, 132, *Gurney vs. Womersley*. *Story on Agency*, sec. 267. 1 *Parsons on Cont.*, 218. 89 *Eng. C. L. Rep.*, 53, *Hall vs. Conder*.

ECCLESTON, J., delivered the opinion of this court.

This is an action of *assumpsit*, in which the *narr* contains the four common money counts only. The plea is *non assumpsit*.

At the trial, the plaintiffs gave in evidence a promissory note with the protest thereof attached. The following is a copy of the note:

“\$681.

*Baltimore, Feb'y 1st, 1854.*

Eleven months after date, I promise to pay to the order of

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J. F. Kridler six hundred and eighty-one  $\frac{8}{10}$  dollars, value received.  
EDWD. DUNN."

On said note the following names appear as endorsers:

"JACOB F. KRIDLER,  
HENRY SHIRK,  
JACOB F. KRIDLER."

Black, a witness for the plaintiffs, testified that they purchased said note from the defendant, who was a public bill and note broker in the city of Baltimore, for the sum of six hundred and fifty-one dollars and eight cents. Upon cross-examination, this witness stated that the defendant was generally known in the city of Baltimore as a public bill and note broker, largely engaged in the business of selling bills and notes, and that the plaintiffs had frequently bought the promissory notes of other persons from said defendant, before the purchase by the plaintiffs of the note offered in evidence. That the defendant was in the habit of bringing to the counting-room of the plaintiffs a large number of notes at a time, for the purpose of selling them, or some of them, to the plaintiffs, before the sale to them of the note in question.

It was proved by the plaintiffs that the name of Dunn, as maker, and that of Shirk, as endorser of the note, were forged. But the plaintiffs' witnesses, who proved this, testified that each of the two signatures of Jacob F. Kridler upon the note was the genuine signature of said Kridler; and that he was in excellent credit in the city of Baltimore down to the 27th day of November 1854, when he ran away from Baltimore, having committed other forgeries; and that he left some property behind him in the city on which there were "mechanics' liens."

It was admitted, that before the suit was brought, the plaintiffs offered to return the said note to the defendant, and he refused to take it.

The defendant's witness, Patterson, testified that he was then in the employment of the defendant, and was so before and at the time of the sale of the note by the defendant to the plaintiffs; that Jacob F. Kridler was in the habit, before said sale, of putting into the hands of the defendant, as a bill and note broker, for the purpose of sale on account of said Kridler,

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various notes held by him, and with his name on them, but that the witness could not recollect particularly the note in question as one amongst those so put into defendant's hands; that the defendant is a public bill and note broker in the city of Baltimore, for all persons who may employ him for that purpose, handing over to such persons the proceeds of sale of such notes as are so sold, less the usual commission charged upon such sales; and that the proceeds of sale of the note given in evidence in this case, were paid by the defendant to his principal, who employed him to sell it, less the usual commission aforesaid, before the alleged forgery of the names of Dunn and Shirk upon said note was suspected, either by the plaintiffs or the defendant.

The plaintiffs then prayed the court to instruct the jury, "that if they find from the evidence that the defendant sold to plaintiffs the paper given in evidence by the plaintiffs, purporting to be the promissory note of Edward Dunn, in favor of, and endorsed by Jacob F. Kridler, and also purporting to be endorsed by Henry Shirk, and if they further find that the names of Edward Dunn and Henry Shirk, as drawer and endorser of said note, were forgeries, that then the plaintiffs are entitled to recover such sum as the jury may find was paid by them to the defendant for said paper, notwithstanding the jury may find that the defendant acted as agent in said sale, unless they also find that the defendant, at the time of such sale, disclosed the name of the person or persons for whom he acted as agent in such transaction."

The defendant submitted three prayers.

The court granted that of the plaintiffs, but rejected all those of the defendant; to which ruling of the court the defendant excepted; and by this appeal he seeks to have the judgment below reversed.

In *Story on Prom. Notes*, sec. 118, (*New Ed.*.) when speaking with reference to the responsibility of a party who transfers a note by delivery merely, it is said, he warrants the instrument to be genuine, and not forged or fictitious, "unless where the note is sold as other goods and effects, by delivery merely, without indorsement, in which case it has been decided

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that the law respecting the sale of goods is applicable, and that there is no implied warranty." See, also, the cases cited in note 1 to this section.

In *Chitty on Bills*, ch. 6, page 246, he states the law to be, that the assignee of a bill has, in general, no right of action whatever against the assignor, in case the bill turns out to be of no value, "when a transfer by mere delivery, without indorsement, is made by way of *sale* of the bill or note, as sometimes occurs, or exchange of it for other bills."

Of course neither of these authors has reference to any case in which the assignor has been guilty of any fraud in the transaction.

In *Baxter vs. Duren*, 29 Maine, 434, the plaintiff instituted an action of *assumpsit*, relying upon a supposed warranty of the genuineness of the signatures of two endorsers upon a promissory note.

The signature of C. & J. S. Bedlow, as makers of the note, payable to J. P. Wheeler, or order, was genuine. The names of J. P. Wheeler and William Deming, as endorsers, were forged.

The defendant handed the note to Wood, a broker, for discount or sale, without endorsing it. The note was sold to the plaintiff by the broker at a discount, in which transaction he acted in his ordinary course of business. The plaintiff, the defendant, and the broker, were all entirely ignorant that the names of the endorsers were forged. Before the note became due, the makers failed. The broker knew that the defendant was acting as agent of the makers. There was no proof that the broker informed the plaintiff that he was acting for the defendant, or that the defendant was acting for the makers.

One of the questions involved in the case was, whether Wood, the broker, who was examined as a witness by the plaintiff, and objected to by the defendant, was not incompetent, on the ground of interest? His interest being supposed to consist in a liability on his part to refund the money to the plaintiff; and if, by his testimony, he could enable the plaintiff to recover the amount from the defendant, as the principal for

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whom the witness had acted as agent, he, the agent, would be relieved from liability.

The court thought the plaintiff might be presumed to have known, from the nature of the broker's business, that he was acting as an agent of some person unknown; and that, therefore, the broker was to be regarded as one dealing with the plaintiff as an agent, without disclosing his principal. And that the defendant was in a like position, dealing with the plaintiff by an agent, and yet dealing with him as an agent, without disclosing his principal.

After speaking in relation to the rule of law applicable to an agent under such circumstances, the court say: "It becomes, therefore, necessary to inquire whether Wood, by making sale of the note by delivery merely, without indorsement, and without making, as of his own knowledge, any representations respecting it, and without disclosing his principal, became liable to refund the money which he obtained by the sale of it."

It is then said: "When an innocent holder of negotiable paper parts with it by delivery, without indorsing it, in payment of a debt due, or then created, as for example, in payment for goods then purchased, or by way of discount for money then loaned by a bank, banker, or individual, and the paper proves to have been forged, the debt or loan, not being paid by it, may be recovered. In such case there is a warranty implied by law, that the paper is genuine, as there is that coin or bank notes, used for like purposes, are genuine. *Jones vs. Ryde*, 5 *Taunt.*, 488. *Fuller vs. Smith*, 1 *C. & P.*, 197. *Camidge vs. Allenby*, 6 *B. & C.*, 373, *per Littledale*, J. *Coolidge vs. Brigham*, 1 *Metc.*, 547.

"When no debt is due or created at the time, and the paper is sold as other goods and effects are, the purchaser cannot recover from the seller the purchase money. There is in such case no implied warranty of the genuineness of the paper. The law respecting the sale of goods is applicable. The only implied warranty is, that the seller owns or is lawfully entitled to dispose of the paper or goods. *Bank of England vs. Newman*, 1 *Ld. Raym.*, 442. *Fenn vs. Harrison*, 3 *Term Rep.*,

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757. *Fydell vs. Clark*, 1 *Esp. Rep.*, 447. *Emly vs. Lye*, 15 *East.*, 6. *Ex-parte Shuttleworth*, 3 *Ves.*, 368. *Ex-parte Blackburne*, 10 *Ves.*, 204. *Ellis vs. Wild*, 6 *Mass.*, 321."

It was held, that Wood was not liable to refund the amount received for the note, and was, therefore, a competent witness.

Upon the application of the same principle which prevented Wood from being liable, the court decided that the defendant was not liable, without proof of an express warranty, because "he had a right to dispose of the note as a piece of property, deriving his authority from the makers, who were liable."

We have been induced to examine that case with much care, because we think it was correctly decided, and is, in most respects, very similar to the one before us.

There, in deciding against the plaintiff's right to recover, much stress is laid upon the facts, that the transaction was a *sale*, when no debt was due to the plaintiff, or created at the time; and the note was parted with by mere delivery, without indorsement, or any express warranty.

These important facts existing, the defendant was held not to be responsible for the return of the money paid for the note, although the names of the indorsers were forged, (this fact not being known to the plaintiff, defendant, or broker,) and notwithstanding the makers failed before the note became due.

The court express the opinion, that the cases which had been decided on this subject, were rather apparently in conflict than really so, and that this apparent conflict had arisen from a failure to notice the important difference between a case where an innocent holder of negotiable paper parts with it by delivery, without indorsing it, *in payment of a debt due, or then created*, and a case where the paper is so parted with, *by a sale, when no debt is due, or created at the time*.

The evidence before us shows clearly that the name of Dunn as maker, and Shirk's name as indorser, were forged; but that the plaintiffs and the defendant knew nothing of this until after the sale, and the money had been paid over by the defendant to Kridler, less the usual commissions. Kridler is the payee in the note, and his two signatures on the back of it, are in his handwriting. The plaintiffs' own witness proves that the

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note was *purchased* by the plaintiffs from the defendant, who was a public bill and note broker, and generally known and largely engaged as such; the plaintiff having frequently bought other notes from the defendant, previously to the purchase of the note in question.

The note is dated February 1st, 1854, payable eleven months after date.

It is in proof that Kridler was in excellent credit down to the 27th of November 1854. That he left some property behind him, on which there were mechanics' liens.

In addition to proof of *a sale* by the plaintiffs' witness, the defendant's also speaks of the transaction as a *sale*. And the prayer of the plaintiffs asked the court to instruct the jury, "that if they find from the evidence that the defendant *sold* the paper given in evidence by the plaintiffs," &c.

There was no endorsement on the note by the defendant, no evidence of any express warranty given, or representation made by him, amounting to a warranty, that the forged signatures were genuine; nor was there any proof of a previously existing debt, or of one created at the time by a loan. And considering this to be a sale, as other goods and effects are sold, we think that, according to the principles announced in *Baxter vs. Duren*, the plaintiffs are not entitled to recover, and that the court were wrong in granting the prayer of the plaintiffs.

We have carefully examined the cases relied upon by the appellees' counsel, and, in our opinion, there are features in each which distinguish them, materially, from the case before us.

This judgment will be reversed, without ordering a *procedendo*, and therefore we need not decide whether the defendant's prayers were properly refused or not.

*Judgment reversed, and no procedendo ordered.*

(Decided January 13th, 1859.)

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**WILLIAM G. FORD vs. THE STATE OF MARYLAND.**

In a trial on an indictment for murder, a verdict simply of "guilty," is insufficient, because, by the act of 1809, ch. 138, sec. 3, the jury *must* ascertain in *their verdict* the *degree* of the crime, whether it be murder in the *first or second degree*.

Jurors cannot testify in relation to the motives upon which they joined in the verdict; if, through mistake or partiality, they deliver an improper verdict, the court may, *before it is recorded*, desire them to reconsider it, but the jury cannot be allowed to make any alteration *after* the verdict is recorded.

After the foreman, *speaking for the whole panel*, finds a proper verdict, which is *recorded*, and the whole panel is called on to *hearken to it* as the court hath recorded it, and they have so *hearkened to it*, no objection being made by any juror, or the counsel for the State or prisoner, such verdict is the verdict of the whole panel, and it is then *too late* for any of the jury to alter or amend it, and also too late to *poll* the panel.

The object of a *poll* is to call on *each* juror to answer for himself, and in his *own language*, and where, in a trial for murder, the verdict was simply "guilty," and on being polled, the *foreman alone* answered "guilty of murder in the first degree," and *each of the others* answered "guilty," *without specifying the degree in words*, such verdict is *insufficient*, because at no time did *all* the jury find the prisoner "guilty of murder in the first degree."

By the Bill of Rights of this State, *every man* has the *right* to "a speedy trial by an impartial jury, without whose *unanimous consent* he ought not to be found guilty;" *unanimity* is *indispensable* to the sufficiency of a *verdict*.

Whatever assumes the solemnity of a *judgment* of a court of record, is part and parcel of the *record*, and examinable in the *appellate tribunal* on a *writ of error*.

Whilst the appellate court cannot find the *facts*, yet the *judgment* of the inferior court on those facts is a *matter of law*, and where the facts are found by the court or jury below, it is the proper and legitimate province of the appellate court to see that the inferior court has pronounced correctly the *law* as applicable to the *facts*.

Where the judge of an inferior court, in his *decision*, embodied in the transcript of the record sent to the appellate court, *sets forth* the *facts* occurring upon the rendition of a verdict in a trial for murder, and these facts show that *all* the jury *did not at any time* find the prisoner "guilty of murder in the first degree," the *judgment* of the court, upon such *verdict*, sentencing the prisoner to be hanged, may be reviewed by the appellate court on *writ of error*, notwithstanding the *docket entries* of the court below, both original and as *extended* in the transcript, show a *verdict* in due form, of "guilty of murder in the first degree."

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In such a case, the appellate court may look to the misprision of the clerk, who is but the hand of the court, and whose duty it is, in contemplation of law, to record nothing but the proceedings of the court.

Where there has been, in the eye of the law, no valid and sufficient *verdict*, there must be a *new trial*; in such a case there is a *mistrial*, and the indictment being good, the prisoner may be tried anew on the same indictment.

#### ERROR to the Criminal Court of Baltimore.

The plaintiff in error was indicted for murder. The indictment contains but one count, charging the prisoner with the wilful murder of Thomas H. Burnham, by shooting him with a pistol. The prisoner was arraigned, and pleaded not guilty.

The transcript of the record sent to the Court of Appeals sets out the presentment, indictment, arraignment, plea, the empanelling of a jury to try the case, and then states that the jury, "upon their oath aforesaid, do say, to wit: on the fourth day of October, in the year aforesaid, that the said William G. Ford is guilty of the felony and murder above charged and imposed upon him; and thereupon, on the prayer of the counsel of the said William G. Ford, the said jury, that is to say, the said" (naming the individual jurors) "so elected, tried and sworn, as aforesaid, to say the truth of and upon the premises aforesaid, being polled and severally named, upon their oath aforesaid, do say that the said William G. Ford is guilty of the felony and murder above charged and imposed upon him, and that said felony and murder is murder in the first degree."

The docket entries of the court below, which it was agreed by the State's Attorney and the counsel for the prisoner, should be incorporated into the record of the case in the Court of Appeals, as if brought up under a writ of diminution, show the following entry or entries: "Oct. 4th, 1858, Verdict, Guilty of murder. Jury polled, Guilty of murder in the 1st degree."

The prisoner, by his counsel, moved in arrest of judgment for a new trial, and also made the following motion:

"The prisoner, by his counsel, comes into court here and moves the court to strike out all of the entries made on the docket of the court in this case on the fifth day of October,

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which entries are in the words and figures following, that is to say: 'Jury polled, Guilty of murder in the 1st degree,' which words here set out, were not found by the said jury, and were not on the docket of this court when the clerk ordered the jury to hearken to the record of their verdict as recorded in the said case by this court; the simple entry at that time being, 'Guilty of murder,' as the verdict of the jury; and these words lastly herein set forth, that is to say, 'Guilty of murder,' being the only words on the docket of the clerk on the day after the verdict was found, which was the evening of the 4th of October 1858, and the other words and figures hereinbefore set forth, that is to say, 'Guilty of murder in the 1st degree,' were added by the clerk of this court on the day following that on which the jury found their verdict in the said case, and on the day after the said jury had been discharged, which was an excess of authority by the said clerk, and illegal."

The counsel for the prisoner then filed the following reasons in support of the motion in arrest of judgment:

"1st. That the jury who were empanelled to try the said case, and who did find a verdict therein, did not find of what degree of murder they found the prisoner guilty, but their verdict, as announced in the court, and as recorded by the clerk, was in these words, 'Guilty of murder.' And this finding of the jury is insufficient to enable the court to pass sentence, and therefore insufficient and void.

"2nd. Because the jury who tried the said case, and who found a verdict therein, did not unanimously pronounce a verdict in the said case of murder, and at the finding of the said verdict say further, of what degree they found the said murder, of which they had convicted said prisoner, to be, which they were required to do by the act of Assembly of this State, in such case made and provided; and the said verdict is therefore void.

"3rd. Because it is the duty and sole right of the jury who try a case of murder, to find the degree, if they convict the accused of the crime of murder, and to find the degree of which they do convict, as a part of their verdict, and to an-

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nounce it as such, which was not done by the jury in this case, and therefore the verdict of the jury is void.

"4th. The jury rendered their verdict in this case on Monday evening, the 4th instant, and the verdict recorded by the clerk on that evening, was simply and only in the words, 'Guilty of murder,' and no more. These were the only words on the docket on the morning of the 5th instant, the day after the rendition and recording of the said verdict, and when the counsel for the prisoner examined the docket of this court, and saw the manner and form of the verdict, they desired the clerk to make no change of the said verdict as recorded, in any way, and he said that he would not; and they, the counsel for the prisoner, came into this court and made a motion in arrest of judgment, basing their motion on the said verdict. Since they made the said motion in arrest, they have discovered that the said clerk has added to the verdict aforesaid, 'Jury polled, Guilty of murder in the first degree,' which is no part of the verdict, and the said clerk had no right to make such addition, and the defective verdict recorded by the said clerk is not and cannot be amended by the improper and unauthorised addition of the said clerk, made as aforesaid."

Reasons in support of the motion for a new trial were then filed, but need not be stated. The prisoner, by his counsel, then filed the following affidavits:

"*State of Maryland, City of Baltimore, to wit:*—On this 21st day of October, in the year eighteen hundred and fifty-eight, before the subscriber, a justice of the peace of the State of Maryland, in and for the city of Baltimore, personally appeared Wilson C. N. Carr, and made oath on the Holy Evangel of Almighty God, as follows, viz: that he was in the criminal court on the evening when the jury rendered their verdict in the case of the State vs. William G. Ford; that he was standing within a few feet from the seat occupied by Mr. Schley, the deputy clerk, and that the following are the facts and circumstances attending the rendition of said verdict, viz: Mr. Schley asked the jury in the usual form, 'Gentlemen of the jury, have you agreed upon your verdict?' to which they responded, 'Yes.' Mr. Schley then said, 'Who shall say for

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you?' to which they responded, 'The foreman.' Mr. Schley then ordered the prisoner to stand up, and to hold up his right hand; he then addressed the jury, 'Gentlemen of the jury, look upon the prisoner, how say you, is William G. Ford, the prisoner at the bar, guilty of the matter whereof he stands indicted, or not guilty?' to this the foreman responded, 'Guilty.' Mr. Schley then said, 'Gentlemen of the jury, hearken to your verdict as the court hath recorded it, your foreman saith that William G. Ford, the prisoner at the bar, is guilty, and so you say all?' Just at this time Mr. Hack appeared in court, and asked Mr. Schley what was the verdict? He replied, 'Guilty,' and added that it was 'first degree.' Mr. Hack said, 'What did the jury say?' Mr. Schley responded, 'They said guilty.' Mr. Hack then said, 'You must only record what the jury said;' and then he demanded a poll of the jury. Mr. Schley then said to the jury, 'Gentlemen, answer as your names are called,' and, calling the foreman's name, he asked this question, 'How say you, guilty or not guilty?' to which the response was, simply, 'Guilty;' and so did each juror answer as his name was called. And the said W. C. N. Carr further makes oath, that he had a conversation with Mr. Schley, on the same evening, in the clerk's office, after the court had adjourned, in which he told Mr. Schley that the verdict was not properly taken and entered; that the jury ought to have ascertained the degree of the crime. Mr. Schley said, that it was all right; that it had been decided not to be necessary to designate the degree; a general verdict of guilty meaning, he said, guilty of the highest grade of offence. This deponent then asked Mr. Schley how, when he came to make up the full record in the case, he could insert the words, 'that the said Wm. G. Ford is guilty of the murder aforesaid, above charged and imposed upon him, and that the said murder is of the first degree?' &c.; to this Mr. Schley replied, that he was not bound by the form in *Harris' Entries*, and that he would have no trouble about making the record.

Sworn before—DANL. E. MYERS."

"On this 21st day of October 1858, in open court, in the criminal court of Baltimore city, appeared Archibald Stirling,

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Jr., and makes oath that he was present in court at the rendition of the verdict in the case of Wm. G. Ford; that he has read the affidavit of W. C. N. Carr, hereto annexed, and that his recollections of the facts is the same as Mr. Carr's, except that his recollection is, that when Mr. Hack came into court and asked Mr. Schley 'What was the verdict?' Mr. Schley answered, 'Guilty generally,' and added, 'that means murder in the first degree.' Mr. Hack replied, 'What did the jury say?' and then demanded the poll. His recollection as to the question asked by Mr. Schley to the jurors, on the poll, is the same as Mr. Carr's. This deponent also says, that he knows nothing of the conversation between Mr. Carr and Mr. Schley, mentioned in the affidavit of Mr. Carr.

Oct. 21st, 1858. Sworn to in open court.

THOS. H. GARDNER, Clerk."

"Oliver F. Hack, being duly sworn in open court here, deposeth and saith, that on the evening of the rendition of the verdict in this cause, after the same had been rendered, and whilst there was some discussing going on between the jury and the court, he entered the court room, and advancing to the desk of the then acting clerk, Mr. Schley, inquired of him, Mr. S., what the verdict was? to which he replied, 'Guilty of murder.' Some person standing near remarked, at the same time, that no such verdict had been rendered; that the jury, when asked to hearken to their verdict, stated merely that he, the prisoner, was guilty, and nothing was said of murder. Mr. Schley then observed, that the verdict of guilty meant guilty of murder in the first degree. Deponent then stated to Mr. Schley that the meaning of the verdict was a matter of legal construction, and that although the verdict was recorded as guilty of murder, when it should merely have been guilty, that he must not change or affect that verdict. The poll of the jury having been asked by deponent thereupon, nothing was said to them as to the degree of the murder found by them, but, when responding to their names, they were asked to say merely whether the prisoner was guilty or not guilty, to which they severally replied, 'Guilty.' The verdict was recorded on the evening

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of its rendition, stood without any addition or any qualification, and upon the application of deponent, on the next morning, that Mr. Schley should not make any change in the record, he stated that he would not. He afterwards did so, by inserting the poll as it appears.

Oct. 21st, 1858. Sworn to in open court.

THOMAS H. GARDNER, Clerk."

"I was present in the criminal court on the night when the verdict in the case of the State vs. Ford was rendered. The jury were called, and, through their foreman, rendered a verdict of 'Guilty.' I am the more certain of this, as the sufficiency of such a verdict was, at the very moment, made a subject of discussion between a professional brother and myself. Immediately after the rendition of the verdict, Mr. Hack came within the bar, and demanded the polling of the jury, when the clerk, Mr. Schley, put to each of the jury, calling them by name, the same question that he had put when the foreman answered for the whole, viz: 'How say you, is William G. Ford, the prisoner at the bar, guilty of the matter wherewith he stands charged, or not guilty?' This statement is given at the request of the counsel for the prisoner.

ROBT. D. MORRISON."

"On this 21st day of October 1858, before me, the subscriber, a justice of the peace of the State of Maryland, in and for the city of Baltimore, personally appeared Robt. D. Morrison, and made oath that the matters and facts hereinbefore stated are true, to the best of his knowledge and belief.

DANL. E. MYERS."

By order of the court, the following *certificate*, signed by all of the jury who tried the case, was filed:

"We, the undersigned, jurors empanelled and sworn to try the issue between the State of Maryland and William G. Ford, indicted at the September term of the criminal court of Baltimore, for the murder of Thomas H. Burnham, do hereby certify, that on the night of the 4th of October 1858, the jury in said cause having agreed upon their verdict, were placed in the bar to render the same. That the clerk of the court turned

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to the jury and said: ‘Gentlemen of the jury, have you agreed upon your verdict?’ Our foreman answered, ‘Yes.’ Clerk, ‘Who shall say for you?’ The jury said, ‘Our foreman.’ The clerk said, ‘William G. Ford, stand up, and hold up your right hand; Gentlemen of the jury, look upon the prisoner at the bar, what say you, is Wm. G. Ford, the prisoner at the bar, guilty of the matters whereof he stands indicted, or not guilty?’ Our foreman answered, ‘Guilty as charged in the indictment.’ The clerk said, ‘Gentlemen of the jury, hearken unto your verdict as the court hath recorded it; your foreman saith that Wm. G. Ford, the prisoner at the bar, is guilty of the murder whereof he stands indicted, and so you say all?’ Mr. Hack, the prisoner’s counsel, then asked that the jury be polled; whereupon the clerk said to our foreman, in our hearing, ‘Daniel D. Hobbs, is William G. Ford, the prisoner at the bar, guilty of murder in the first degree, or not guilty?’ Our foreman said, ‘Guilty.’ The question was then put to each of us, by name, ‘What say you, guilty or not guilty?’ We each of us, in turn, answered, ‘Guilty;’ thereby meaning, intending, and most assuredly understanding our verdict as ‘Guilty of murder in the first degree.’”

By order of the court, also, the following affidavit of the clerk who received the verdict, was filed in court:

“Be it known, that on this 8th day of October, A. D., 1858, before me, the subscriber, a justice of the peace of the State of Maryland, in and for the city of Baltimore, personally appeared Wm. Louis Schley, and made oath in due form of law, that he was the clerk who received the verdict from the jury empanelled to try Wm. G. Ford, indicted for murder, at September term of the criminal court of Baltimore, and that the said verdict was rendered before said court on the evening of October 4th, 1858, in manner following: When the jury were placed in the bar, the following questions were asked by him, the said Wm. Louis Schley: ‘Gentlemen of the jury, have you agreed upon your verdict?’ ‘Yes.’ ‘Who shall say for you?’ ‘The foreman.’ Clerk, to prisoner, ‘Wm. G. Ford, stand up, hold up your right hand’—‘Gentlemen of the jury, look upon the prisoner at the bar, what say you,

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is William G. Ford, the prisoner at the bar, guilty of the matter whereof he stands indicted, or not guilty?" Answer by the foreman—"Guilty." "Gentlemen of the jury, hearken unto your verdict as the court hath recorded it, your foreman saith that Wm. G. Ford, the prisoner at the bar, is guilty of the murder whereof he stands indicted, and so you say all?" Mr. Hack then asked that the jury be polled; whereupon the clerk, the said Wm. Louis Schley, said to the foreman, "Is Wm. G. Ford, the prisoner at the bar, guilty of murder in the first degree, or not guilty?"—this question was put to the foreman alone—to which question the foreman, Danl. D. Hobbs, answered, "Guilty." The question of "What say you, guilty or not guilty?" omitting the words "first degree," was put in turn to each juror of the remaining eleven, who in turn answered, "Guilty."

CHARLES ALEXANDER."

The court (STUMP, J.,) filed the following opinion:

"CRIMINAL COURT OF BALTIMORE,—*State of Maryland vs. William G. Ford*—Indicted Sept'r term 1858, for the murder of Thomas H. Burnham.

"After a verdict was found, motions in arrest of judgment and for a new trial were made by Cowan and Hack, counsel for the prisoner, and assigned the following reasons, in substance, for arresting the judgment of the court:

"1st. That the jury who were empanelled, and who did find a verdict therein, did not find what degree of murder the prisoner was guilty of.

"2nd. Because the jury who found the verdict did not unanimously pronounce a verdict in said case of murder, nor find the degree of murder, as they were required by the act of Assembly to do.

"3rd. Because it was the duty and sole right of the jury, who try a case of murder, to find the degree of which they convict the prisoner.

"4th. The jury rendered their verdict on Monday evening the 4th inst., and the verdict then recorded by the clerk was simply in the words, guilty of murder, and no more; on the succeeding morning after the jury had been discharged and the prisoner was absent, contrary to the request of his counsel,

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inserted on the docket of the court the words: ‘Jury polled— guilty of murder in the first degree;’ without the order of the court or authority of law, &c.

“The prisoner’s counsel also move the court to strike out the words, ‘Jury polled— guilty of murder in the first degree;’ which were written on the court docket, the morning after the rendition of the verdict, by the clerk of the court, &c.

“The reasons assigned for the motion for a new trial are in substance:

“1st. Because the verdict is contrary to the evidence.

“2nd. Because the verdict is contrary to the weight of evidence.

“3rd. Because of irregularity in empanelling the jury.

“4th. Because one of the jurors who was empanelled to try the said cause was not of the legal age to act as a juror.

“5th. Because a juror who tried the case was disqualified to try the case by having expressed an opinion previously.

“The reasons filed for a new trial were not argued before the court, and no evidence offered to the court to prove any of the facts stated in them, wherefore the court had no grounds for considering them otherwise than as abandoned by the prisoner’s counsel.

“The motion to arrest the judgment, and the preliminary one to strike out the entries of ‘Jury polled— guilty of murder in the first degree,’ (which seem to be inseparable,) were argued at length and relied upon by the counsel for the prisoner.

“Mr. Cowan, in favor of the motion, argued, that the act of 1809, ch. 138, sec. 3, enacted, that murder in the State of Maryland shall consist of two kinds, viz., murder in the first degree and murder in the second degree, and if the jury find any one guilty of murder in the first or second degree, they must find the degree in their verdict, otherwise the court cannot pronounce judgment on the prisoner, according to the act, which punishes murder in the first degree with death, and murder in the second degree with confinement in the penitentiary. He contended that neither the clerk nor the court could add one word to the minutes of the verdict entered as taken in the presence of the jury and the prisoner, nor subtract a word

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from the verdict or minutes after the jury were discharged, nor could the jury themselves be allowed to correct any mistake in the minutes, taken by the clerk after they were discharged. In support of this doctrine, he read from 1st *Chitty Crim. Law*, and some other authorities. The act of 1809, and the affidavits of W. C. N. Carr and others, relating to the manner and some of the facts connected with the taking of the verdict by the clerk, (Mr. Schley,) which do not correspond, in some essential particulars, with the recollection of this court, nor with the affidavit of the jurors who found the verdict, nor that of the clerk who recorded the verdict; which affidavits are filed in this court and constitute a part of this record. Mr. Hambleton replied on the part of the State, and cited a number of authorities from text-books and reported cases, some of which the court has read, but has not time to digest them here. Mr. Whitney closed on the part of the State, and argued that it was not required of the jury to negative the minor offences charged in the indictment. That a general verdict on an indictment is sufficient to cover the highest offence in that indictment. If it was the intention of the jury to convict of the smaller offence, they would have so specified in their verdict, and if the jury, under the present indictment, which contained but one count embracing murder in the first degree, rendered a verdict of *guilty*, that satisfied the act of Assembly. To this conclusion of law this court cannot assent. The State's Attorney referred to 6 *Binney's Rep.*, 179, *White's Case*; upon examination of which it will appear that the jury found White guilty of murder *in the first degree without any dispute*. The only question in the case of Ford is, whether the jury did or did not find him guilty of murder in the first degree. Upon this fact in Ford's case turns all the law and evidence. Mr. Whitney cited also 7 *Md. Rep.*, 442, *Weighorst's Case*, wherein the court say, if the jury find a person guilty of the smaller degree of murder they need not negative murder in the first degree; also case of *Sutton* in 4 *Gill*, and *Manley's Case*, 7 *Md. Rep.*, who was found guilty of an assault with intent to kill George Konig, without negating the count for a simple assault. But no case has been cited, or can

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be found, to establish the doctrine, that where a jury find a person *guilty* on an indictment which covers murder in the first degree, murder in the second degree, and manslaughter, without specifying which offence he is guilty of, that the highest offence is found by such a general verdict, although finding him guilty of murder in the second degree or manslaughter will negative murder in the first degree.

"Mr. J. Nelson closed the argument for the prisoner, in most of which this court will concur, but not to the supposed facts upon which it is predicated. He argued, that the indictment was drawn according to the forms of the common law used before the passage of the act of 1809, and covered both degrees of murder, and it would be an arbitrary exercise of power by the court to determine what degree of murder the jury intended to find. That the jury are to find it as a fact by their verdict, (and not otherwise,) whether the offence be of the first or second degree of murder. The jury are bound, by the act of Assembly, to make a specific finding. If the prisoner, in court, had pleaded guilty, it would be the duty of the court to examine the evidence and ascertain the degree, for he could not plead guilty to the first degree. The prisoner only pleads guilty or innocent of the whole indictment, and this being the case, the jury must find in their verdict the fact and particularise the degree of murder. The proper enquiry in this case is, whether the jury have found the degree in their verdict, and if not the act of Assembly has not been gratified; nor has the court a right to find the degree instead of the jury, because the prisoner did not plead guilty. On the other hand, if the jury have determined the degree of murder *that is an end of the question*. He cited *Binney's Rep.*; 6 *Gill, Ohio and Missouri Reports*. He also read from 3 Vol. *British Crown Cases*, about the place where the culprit should be buried, which is no part of our law. This court accedes to all the legal part of this argument and adopts it all so far as it goes, but it does not reach or settle the main question of fact, whether the jury found the prisoner guilty of murder in the first degree or guilty of murder generally.

"In order to a clear conception of the law we are consider-

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ing, it may be better to insert the whole of the 3rd sec. of our act of 1809, ch. 138, which is a copy of the act of Pennsylvania of 1794; it reads in these words:

“And whereas the several offences, which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness, that it is unjust to involve them in the same punishment, therefore, be it enacted, that all murder which shall be perpetrated by means of poison, or by lying in wait, or by any kind of wilful, deliberate and premeditated killing; or which shall be committed in the perpetration of, or attempt to perpetrate, any arson, or to burn any barn, tobacco house, stable, warehouse, or other out-house, not parcel of any dwelling house, having therein any tobacco, grain, hay, horses, cattle, or goods, wares and merchandize; rape, sodomy, mayhem, robbery or burglary; shall be deemed murder of the first degree; and all other kind of murder shall be deemed murder of the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder in the first or second degree, but if such person be convicted by confession, the court shall proceed, by examination of witness, to determine the degree of the crime, and to give sentence accordingly; and every person liable to be prosecuted for petit treason shall, in future, be indicted, proceeded against, and punished, as is directed in other kinds of murder, according to the degree.”

“Mr. Nelson also argued, (and cited some cases to shew,) that it was too late, upon polling the jury, to fix the degree of murder. That the jury must answer upon first being interrogated by the clerk, and then it is the prisoner’s privilege to poll each man individually, to ascertain what his judgment was. The clerk had no right to put leading questions to the jury to bring out their verdict; that no man’s life would be safe under such proceedings, &c.

“The court will finally proceed to consider the fact, whether the jury did or did not find the prisoner guilty of murder in the first degree, which (as Mr. Nelson says) settles the question. When the jury came into court it was late in the evening, and

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Mr. Whitney, the prosecutor, was absent on account of sudden indisposition, but the court supposed he was present to attend, as usual, to the rendition of the verdict, according to the usual manner. The clerk asked the jury if they had agreed upon their verdict, and who should say for them, to which they responded they had agreed, and their foreman should say for them. Whereupon the clerk told the prisoner, calling by name, William G. Ford, to stand and hold up his right hand, and requested the jury to look upon him, and then asked the jury: ‘How say you gentlemen, is William G. Ford, the prisoner at the bar, guilty or not guilty?’ to which the jury answered guilty, and nothing more. Whereupon, and before any of the jury had left the bar, and whilst the prisoner was before them, Mr. Hack, one of the counsel for the prisoner, demanded that the jury should be polled, whereupon the court directed Mr. Schley, the clerk, who was taking the verdict, to ask the jury, when he polled them, whether they found the prisoner guilty of murder in the first degree or murder in the second degree; to which question, when it was put to the jury, the foreman answered for the jury, in the words, ‘Guilty of murder in the first degree,’ in an audible voice, and each of the remaining eleven jurors, when polled, responded ‘Guilty,’ without specifying the degree of murder in words.

“And thereupon, to wit, on the day and year last aforesaid, all and singular the premises, being, by the court here, seen and fully understood, it is adjudged and considered by the court here, that the said several above motions, that is to say, the said above motion in arrest of judgment, the said above motion for a new trial, and the said above motion to strike out the said above mentioned entry in the said case, on the said docket of the court here, be and the same are, each of them, overruled.”

The transcript then proceeds to state, that the court passed sentence of death upon the prisoner, and sets out the judgment. To correct this judgment the present writ of error was sued out by the prisoner from the Circuit court for Baltimore city, directed to the judge of the Criminal court of Baltimore. This writ states, that: “whereas at a session of the Criminal

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court of Baltimore, begun and held at the city of Baltimore, in and for said city, on the second Monday of September, in the year of our Lord, one thousand eight hundred and fifty-eight, a certain William G. Ford, was convicted and judgment and sentence passed thereon, ordering him to be hanged at such time and place as may please the chief executive of the State of Maryland to appoint. And because in the record and proceedings, as also in the judgment and sentence of the said court, a manifest error hath happened, to the great damage of the said William G. Ford, as of his complaint has been stated, and it is right that the error, if any hath been, should be duly corrected, and full and speedy justice done to the said William G. Ford in this behalf: Therefore you are hereby commanded, that if the judgment aforesaid be therein given, then the record and proceedings aforesaid, with all things thereunto relating, to the Court of Appeals to be holden for the State of Maryland, under your hand and seal distinctly and openly you send, together with this writ, and the record and proceedings aforesaid, being inspected, the said Court of Appeals may further cause to be done therein, for the correcting that error, what of right and according to the laws and customs of the State of Maryland may be done.”

The transcript then states that: “In pursuance whereof, and according to the act of Assembly in such case made and provided, a record of the judgment aforesaid, with all things thereunto relating, together with the said writ of error annexed, is hereby transmitted to the Court of Appeals accordingly.” This is attested by the clerk of the Criminal court of Baltimore, and is accompanied with his certificate attested by the seal of the court, “that the foregoing transcript is a full and true record of the proceedings in the said prosecution against the said William G. Ford.”

The cause was argued before LE GRAND, C. J., TUCK and BARTOL, J.

*Wm. H. Cowan* and *Jno. Nelson* for the plaintiff in error:  
The questions presented by this writ of error are:

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1st. Assuming (as in point of fact was the case) that on the 4th of October, the verdict as then recorded was simply "Guilty of murder," could there have been any judgment rendered thereon?

2nd. Is the fact of alteration by the addition of the words "jury polled—guilty of murder in the first degree," on the following morning out of the presence of the prisoner, shown to this court in such a way as that it can notice and review it?

3rd. If the original verdict as rendered and recorded would not have authorised a judgment, and the fact of such alteration or amendment so appears, had the court below the power to order or authorise such amendment or alteration to be made?

1st. Does a verdict of "Guilty," or "Guilty of murder," authorise a judgment? This depends upon the act of 1809, ch. 138, and to our minds there is no clearer proposition. This indictment is at common law, and not under the statute. It may mean, therefore, under this act, either murder in the *first degree* or murder in the *second degree*. The act makes no alteration in the crime of murder as it stood at the common law, but only makes *grades* of the offence and inflicts *different punishments* for the different degrees. It says, that the jury *shall in their verdict ascertain* the *grade* of the offence, in order to guide the court in inflicting the proper punishment. The court cannot *grope about* for the punishment, or make out from inference or conjecture what degree the jury *intended* to find, but must have *upon the record* the means of ascertaining the punishment; from the record, and from *no other source*, must the court ascertain the *degree* of the crime. A general verdict of "*guilty*" and so recorded, is therefore a mere *nullity*, and this is the more apparent from the fact, that if a prisoner *pleads guilty* the court is not authorised to inflict punishment of death, but is required by the *law* to examine *witnesses* to ascertain the *grade* of the crime. If it was not the intention of the law, that a plea of "*guilty*" entered upon the record should sanction the punishment of death, how is it possible to say that a *verdict* of "*guilty*" can have that effect? Upon authority the question is *equally clear*. In every State in this

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Union where a similar statute exists, the courts have uniformly held, that where the indictment is at *common law*, not describing murder in the *first degree* under the statute, the jury must, in all such cases, find the degree in *their verdict*. In *White's Case*, 6 *Binney*, 183, there is a *dictum*, by the Chief Justice of Pennsylvania, that where the indictment is under the statute, and sets out *on its face* such aggravating circumstances as to constitute murder in the *first degree*, a general verdict of "guilty" would be sufficient. But this was but an *obiter dictum*, and the distinction has been *repudiated* by the courts of every other State, who have said, that whether the indictment be at common law or under the statute, setting out on its face every circumstance of aggravation necessary to designate murder of the highest grade, still the jury must in *their verdict* ascertain the degree, and for the plain reason that the *law* so declares, and what a statute prescribes neither court nor jury can disregard. In *Dick vs. The State*, 3 *Ohio Rep.*, N. S., 89, the question is ably discussed and clearly decided, and to the same effect are the decisions in 8 *Missouri*, 495, *McGee vs. The State*, and *State vs. Upton*, 20 *Missouri*. *Weighorst's Case*, in 7 *Md. Rep.*, 442, is in no way in conflict with this view of the law or with these decisions. In 3 *British Crown Cases*, 301, is a remarkable instance of how rigidly *statute regulations* in such cases are adhered to by the courts in England. There a statute had prescribed, that in passing sentence of death upon a convict, the judge should order the *remains* of the party, after execution, to be disposed of in a particular mode, and the omission of the judge to make such order in that case, was held a *fatal defect* in the judgment and it was set aside. It is clear, therefore, that if the verdict in this case had stood as it was originally rendered, "guilty of murder," simply, no valid judgment could have been rendered upon it.

2nd. The verdict, *in fact*, as originally *recorded*, was "guilty of murder" simply. The additional words, "jury polled—guilty of murder in the first degree," were added on the following morning, out the presence of the prisoner. This is apparent from every affidavit filed in the case, and from the

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*opinion* of the judge himself who passed the judgment. The question is, can this court *look* to this proof? It is urged by the counsel for the State, that this motion *in arrest* of judgment and the writ of error, only bring up matters of error *apparent upon the record*, and that as the record which they construe to mean only the presentment, indictment, plea, issue and *verdict as extended* in this transcript, present no such error as that complained of, this court cannot look beyond them. The *affidavits* in support of the motion, and the *opinion* of the judge, they say, constitute no part of the record, and cannot be looked to or reviewed by this court. Is this the law? We insist that it is not. The laws of Maryland do not, save in some special instances, require a *record*, in the *technical* sense of the word, to be made either in civil or criminal cases. By the uniform practice of our courts, and the absence of statutory provisions requiring judicial proceedings to be enrolled on parchment or recorded, the *docket entries* constitute the only evidence or record of judicial action—these are the *records* of the courts, and such they were decided to be by the Supreme Court of the United States, in the case of *The Phil. Wil. & Balto. R. R. Co., vs. Howard*, in 13 *How.*, 332. When therefore a verdict is rendered in a criminal case, there is no other record of it than what is written by the clerk on his docket *at the time*. When he asks the jury to hearken to their verdict as the court hath *recorded it*, what is then written or entered by him on the docket—not what rests in the recollection of the judge—is the record. The question presented here is, what was the condition of these docket entries at the time this verdict was rendered? The case is in many respects a peculiar one. It is a motion in arrest of judgment, not for any thing appearing on the face of the proceedings before the verdict was *rendered*, but for matters occurring *subsequently*. How must that be made apparent to the court below? By *evidence*, and that *evidence* must appear to this court. It is to be ascertained as a *fact* not by the *docket entries*, for the very purpose and object of the motion is to *correct* those entries, and if they *estop* the motion could never be made. *Affidavits* were filed showing the facts as they occurred. In what other

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way could the motion be sustained? These affidavits, we insist, are a part of *the motion*, and can be looked to by this court for the purpose of ascertaining the condition of the docket entries at the time the verdict was rendered, having been filed in the proceedings of the case in the court below, and embraced in the transcript of these proceedings sent up to this court. But if these affidavits do not constitute a part of the *record*, still, the judge of the court below, in his opinion filed in the case, has *certified* to this court as a *matter of fact*, that the entry of the words "jury polled—guilty of murder in the first degree," was not made till the day succeeding the rendition of the verdict and not in the presence of the prisoner. This is surely a part of the *record*, for it is always in the power of the judge to record the *special matter*, and his finding of a *fact* put upon the record is *part of the record*. The finding of this *fact* by the judge below, cannot be reviewed by this court, but the *effect* of that fact as a *matter of law* is clearly a subject of review by an appellate tribunal. The *judgment* of the inferior court, or the finding of a jury upon an *issue of fact*, the parties have the right, *ex debito justitiae*, to have upon the record, and it is the proper office of a writ of error, to remove the final judgment of the court below, for the revision of the superior court, in order that such court from the premises contained in the record of the inferior court, may either affirm or reverse the judgment, as they draw the same or a different conclusion from that which has been pronounced by the court below. 60 Eng. C. L. Rep., 534, *Newton vs. Boodle*. The opinion or decision of the court below, in this case, set out in the record, ascertains the fact in regard to the docket, and when the alteration was made, and the *effect* of that fact is a *matter of law* which this court can review. None of the many cases cited by the counsel for the State, controvert this position.

3rd. The next question is, had the court power to allow or order the amendment or alteration of the docket to be made on the day following the verdict, and out of the presence of the prisoner? On this point there can be no difficulty. No such power exists. The verdict, whatever may be its effect,

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must in all cases of felony and treason be delivered in *the presence* of the prisoner in open court, and cannot be either privily given or *promulgated in his absence*. (*Chitty's Cr. Law*, 635, 636.) After the verdict is recorded the general rule is, that it cannot be *amended*, unless, indeed the *mistake appear* and be *corrected promptly*. (1 *Wat. Arch. Cr. Pr. & Pl.*, 177, *notes*.) The modern cases say, that an amendment may be made in cases where there is some note or *written memorandum* to amend by, but the judge cannot order an *amendment* from his mere *recollection* of what occurred upon the rendition of the verdict. *Lord Denman*, in the case of *Queen vs. Virrier*, 40 *Eng. C. L. Rep.*, 58, had amended a verdict upon an indictment for *perjury* by his *recollection*, but when the case was brought before him *in banc*, he said, and all the judges concurred with him, "I was of opinion that the judge must have power in a case like this to amend by his *recollection*, and it is clear, that in the present instance, the amendment was one which might be made according to the truth of the facts. But, on consideration, we think that the practice of so amending would be such a *dangerous* one, that, as a general rule of discretion, the court ought to decide against introducing it. In almost all cases of amendment there has been a written document to amend by, and a misprision which was corrected by that. But if reference is made to the *recollection* of the judge as an *individual*, the great *danger* and *abuse* which might result from amending under *such circumstances*, in cases which might be supposed," forbid it to be allowed. If the recorded verdict of a jury, which they have been called on to *hearken to*, as the court hath recorded it in *the presence of the prisoner*, can be amended or altered by the mere *recollection* of the judge, without any note or written memorandum or other writing to correct by, and after the jury has been discharged and out of the presence of the prisoner, then it might be truly said there would be no security for the life, property or liberty of the citizen. In the case in 3 *British Crown Cases*, 301, already referred to, the judge *omitted* in pronouncing sentence on a conviction for murder, to order that the bodies of the prisoners should be buried within the

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precincts of the jail as directed by statute, but on a *subsequent day during the same term*, in the absence of the prisoner, he ordered the clause to be inserted, and it was held, that this correction rendered the sentence *illegal*. That case is a thousand fold stronger in all its particulars than the present. See also on this point, *Comyn's Dig.*, *Amendment P.*; 1 *Salk.*, 47, *King vs. Keat*; *Ibid.*, 53, *Bold's Case*; 1 *Ld. Ray.*, 324, *Miller vs. Trets*; 1 *H. Bl. Rep.*, 78, *Spencer vs. Goter*; 5 *Burr.*, 2661, *Rex vs. Woodfall*.

If the above positions are correct, then clearly this judgment must be corrected. But there are also other *irregularities* which render the verdict insufficient. The affidavit of the clerk, which the judge below ordered to be *filed* in court, and thus to be made a part of the record, shows that not a single juror, when answering upon the poll, found a verdict of "guilty of murder in the first degree," as extended in this transcript, and as entered upon the docket. What is the object and meaning of a *poll of the jury*? It is only for the purpose of ascertaining the individual assent of each juror to the verdict as *already given* by the foreman. Who ever heard of an *independent verdict* being taken on a poll? The clerk here puts the *suggestive* question to the jury: "Is Ford guilty of murder in the first degree or not guilty?" This he had no right to do, for the law says, the *jury* shall ascertain the *degree* of the offence in *their verdict*. The clerk had no right to suggest to them this finding. But again, even if the jury on the poll could find the grade, the affidavit of the clerk shows that not a single juror so *found* in his own language, and the opinion of the judge shows that the *foreman* alone so found, while each of the other jurors said not a word of the degree of the crime. Hence there was no *unanimity* in this verdict, which is a *fatal defect*.

*J. D. Hamilton*, and *Milton Whitney* State's Attorney for Baltimore city, for the State.

The positions maintained by the State, are:

1st. That this court in the consideration of this case upon writ of error, will be strictly confined to the *record* as duly au-

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thenticated, and certified by the court below, and that the *affidavits* and the *opinion* of the court below constitute no part of that record.

2nd. That upon the face of the *record* no errors are apparent, authorising this court to set aside the verdict and arrest the judgment.

Two other questions incidentally arise in the case, namely:  
1st. As to the power of the court below over its own minutes or docket entries; and 2nd. As to the legal effect of a verdict of "*guilty*," supposing that to have been the only verdict in the case.

1st. There is no particular assignment of errors in this writ, and no such assignment has been made in this court. If there were any errors *in fact*, outside of and in making up the record of the court below, either in the process or through default of the clerk, the proper mode of correcting them was by a writ of error *coram nobis*, bringing the matter before the judge who tried the case. The cases of *Bridendolph vs. Zellers*, 3 Md. Rep., 325, and *Hawkins vs. Bowie*, 9 G. & J., 437, clearly show, that in this State a writ of error *coram nobis* lies to correct an error *in fact* in the same court where the record is. This remedy was open to the prisoner in this case, and he should have pursued it if he wished to avail himself of any such errors. We insist then, that in the examination of this case, this court must be confined to the *record*, and look only to those facts that appear upon the record, for it is for the correction of errors *appearing upon the record* that the writ of error is allowed. That writ brings the record before this court. By that record duly and properly authenticated, this court must be strictly governed for its ascertainment of the facts of the case. It is a well settled principle, and one fully established by all the authorities, that he who impeaches the judgment of an inferior court is bound to show to a superior tribunal in what the error consists of which he complains, and that error *must appear upon the record*. It is a settled maxim, that nothing shall be averred against a record, nor shall any plea or proof be admitted to contradict it, otherwise there would be no end to disputes. Such being the settled law, we are to

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consider the question, what is to be taken as the record in this case? and what is a record in the sense in which it is to be here considered? A *court of record* is, where the acts and judicial proceedings are enrolled in parchment or on paper, for a perpetual memorial and testimony; which rolls are called the records of the court, and are of such high and super-eminent authority that their truth is not to be called in question. What the law requires to be enrolled constitutes and forms the record. (*3 Bl. Com.*, 24. *2 Arkansas Rep.*, 14, *Lennox vs. Pike*.) Upon this principle of law, the record consists, in this case, of the presentment, *capias* and return, the indictment, arraignment, plea and issue, empanneling of the jury, the finding by them, the motions by the prisoner's counsel, the judgment of the court upon the same, and the final judgment of the court upon the finding of the jury. No other papers filed in the cause are required by the law to be enrolled or recorded, and, therefore, form no part of the record. The *affidavits* filed in the case form no part of the record: they were but evidence introduced before the court, and upon which it was called upon to act. They are exclusively for the consideration of the court below. This court will not look into these affidavits, otherwise they would be called upon to consider the evidence and determine from the testimony, conflicting as it might be, not what the record is as duly certified by the court below; but what it should be from the evidence adduced, notwithstanding other testimony may have been introduced before the court. These affidavits are but *evidence* upon which the court below have the exclusive right to pass. They may discredit that testimony, or admit oral evidence to contradict or vary it; and when that court has once acted upon that testimony by overruling the motion, they have merely exercised a discretion vested exclusively in them, and their order only overruling the motion becomes a part of the record, and not the reasons upon which the court acted or the evidence laid before them. The authorities on this point are clear. In *Lennox vs. Pike*, *2 Arkansas Rep.*, 14, it was held, that a statement of testimony given in the case, written out and signed by the judge below and filed in the case by the clerk, is no part of the

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record. In *Kirby vs. Wood*, 16 *Maine*, 81, it was decided, that papers presented to a common law court, and acted on only as matter of evidence, are no part of the record, and that a writ of error lies only to correct such errors as are apparent upon the record. In *Williams's Case*, 5 *Md. Rep.*, 82, this court has said, it cannot revise on writ of error, any point or question not appearing *by the record* to have been decided in the court below. In *Godwin's Case*, 5 *Iredell*, 401, a case very similar to this, it was held, that the appellate court could not look into *affidavits* in support of a motion to set aside a verdict in a capital case, but could only decide upon *the record* presented to them. In *Mellish vs. Richardson*, 23 *Eng. C. L. Rep.*, 276, *Tindal, C. J.*, says, the proper office of a writ of error is, to remove the final judgment of the court below for the revision of the superior court, in order that such court *from the premises* contained in the record may affirm or reverse the judgment, and that these *premises* are the pleadings, the proper continuance of the suit and process, the finding of the jury upon an issue of fact, if any such has been joined, and the judgment of the inferior court, and that *all these* premises from which such judgment has been derived, the parties to the suit have the right *ex debito justitiae* to have upon the record, but the orders or rules for amendments of proceedings made by the court in the progress of the suit, and all other interlocutory rules do not fall within the description of any part of the record. This decision was adopted in the case of *Newton vs. Boodle*, 60 *Eng. C. L. Rep.*, 534. In *Coolidge vs. Ingle*, 13, *Mass.*, 50, it is said, that neither the report of the judge of the proceedings at the trial, nor the reasons given for the opinion of the court, nor the papers and documents filed in the case, are a part of the record on a writ of error. In *Storer vs. White*, 7 *Mass.*, 448, papers filed in the case and used as evidence, were held to be no part of the record, and that the court could not take notice of them on a writ of error. In *Pierce vs. Adams*, 8 *Mass.*, 383, a copy of a note sent up with the record, was held not to be a part of the record on a writ of error. *Vandruff vs. Craig, et al.*, 14 *Illinois Rep.*,

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394, decides that an affidavit forms no part of a record. In *Reed vs. Marsh*, 13 Pet., 153, the Supreme court decided, that the certificate of the clerk of a court, that a motion for a new trial was made, and reasons and certain papers filed on which the motion was founded, which are on the files of the court, is not a part of the record, nor do the reasons on the files of the court become a part of the record by such certificate; and in *Williams vs. Norris*, 12 Wheat., 117, the same court held, that the opinion of a judge may explain the views and motives of the court, but does not form a part of its judgment, and cannot constitute a part of the record. See, also, on this point, 1 *Dev. & Batt.*, 506, *State vs. Miller*; 2 *Dev. & Battles*, 163, *State vs. Ephraim*; and 1 *Barr.*, 105, *The Commonwealth vs. Church*; in which latter case it was held, that an opinion of the court filed in a criminal cause by request, according to the provisions of the statute, is not part of the record for revision on writ of error. By the record in this case it appears, that the jury found the prisoner "guilty of murder," and upon being polled on motion of the prisoner's counsel declared and found him "guilty of murder in the first degree." This appearing by the record properly authenticated, is conclusive upon this court, and no evidence will be allowed to contradict it. A party will not be heard in relation to a matter in which he is contradicted by the record. 7 *Missouri*, 600, *Weber vs. Schmeisser*. In *Clagett vs. Simes*, 11 *Foster*, (*N. H. Rep.*,) 22, it was decided, that upon a writ of error nothing can be assigned for error which contradicts the record, and the alleged error there which was sought to be corrected, was, that the judgment against the plaintiff in error was entered up by the clerk without the authority or order of the court. The same thing was decided in 5 *Conn.*, 541, *Wetmore vs. Plant*. 3 *Dana.*, 454, *Cook vs. Conway*. 1 *Pet.*, *C. C. Rep.*, 155, *Field vs. Gibbs, et al.* 2 *Bac. Abr.*, 219.

We think, therefore, we have demonstrated that the *affidavits* and *opinion* of the court below constitute no part of this record, and that this court has no power on this writ to go behind that record. If it has such power, it can take the very life from all the courts of the State.

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2nd. The only other question to be considered is, whether the *record* in this case presents any such error as will justify this court in setting aside the judgment of the court below? The only question that can be raised under this head, is the alleged insufficiency of the verdict as recorded. We insist that the verdict is in conformity to the spirit and letter of the act of 1809, ch. 138, and meets and gratifies all its requirements. The verdict is, "Guilty of murder," and upon being polled, on motion of the prisoner's counsel, they declare and find him "Guilty of murder in the first degree." The act requires, that when a party is put upon his trial, and the jury shall find him guilty of murder, they shall *ascertain*, in their verdict, whether it be murder in the first or second degree. The jury are first to find him guilty of murder, and having done so, they are then, in their verdict, to ascertain and announce whether it be murder in the first or second degree, for the information of the court, to guide them in awarding the proper punishment. No form is prescribed or laid down in which this is to be done. It is to be brought to the knowledge of the court by the jury, and is to be made a part of their verdict. This may be done upon the *polling* of the jury, or in any other way to be adopted by the court, so that it may be made a part of the verdict. Had not the prisoner, through his counsel, availed himself of the right to poll the jury, the court would have directed the jury to ascertain the degree. The court had the right to direct the jury, on the poll being demanded, to ascertain the degree, and whether directed or not, the degree being ascertained and announced on the poll, it rendered it unnecessary for the court so to move. The poll being demanded and allowed, the verdict was not complete until taken on the poll, and it required such taking of the verdict to render the record complete, and whatever was the verdict rendered on the polling, was the verdict of the jury, which the court was bound to record against the prisoner. 8 Iredell, 339, *State vs. John.* 3 Johns., 255, *Burn vs. Hoyt.* 1 Wend., 91, *People vs. Perkins.* 6 McLean, 186, *U. States vs. Potter.* 2 Gilman, 342, *Johnson vs. Howe, et al.*

Of the other questions which arise incidentally in the case,

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the first is upon the motion to strike out the entry, "Jury polled, guilty of murder in the 1st degree;" and is based upon the allegation that it was not made till the morning succeeding the rendition of the verdict. The reasons in support of a motion, are no part of the record, and especially when they contradict the same, as in this case. No evidence was introduced in support of the facts set forth in this motion, and even admitting the alleged facts, they present no error. The daily minutes taken by the clerk, and sanctioned by the court, are only *memoranda* to assist in making up the records of the court. In legal contemplation, they are made under the eye of the court, and by its authority, and when not properly entered or extended, the error may be corrected. *Lord Tenterden, C. J.*, in *Rex vs. Carlisle*, 22 Eng. C. L. Rep., 97, has said, it is impossible that a verdict should be recorded at the time it is given, the record of it being necessarily an act subsequent to the delivery of the verdict by a jury; that no time is fixed by law for the recording of a verdict, the practice being, that a minute of the verdict should be entered forthwith by the officer of the court, and entered of record with the other proceedings at some subsequent time, when a formal record of the whole may be required. In *Hall vs. The State*, 3 Kelly, 23, the verdict of the jury was written on the indictment, but was not entered on the minutes of the court at the term when it was returned, and the court, at the *succeeding term*, ordered the verdict to be entered on the minutes of the court *nunc pro tunc*, and this was held by the Supreme Court of Georgia to be *correct*. In *Mayo vs. Whitson*, 2 Jones' Law Rep., 231, it was held, that a court of record has power to amend its own minutes of a *former term*, so as to set forth *truly* its own transactions, and that in such a case it was not bound by the ordinary rules of evidence, but may resort to *any proof* that is satisfactory to it. The judge there says, the court, in such a case, is entitled to draw evidence from any *pure source*. This would allow the judge below, in this case, to reject all the affidavits, and resort to his own recollection of the facts, and order the entry to be made in accordance with the truth of the facts, as they occurred. The same case de-

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cides, also, that "every court of record has ample power, after a suit is determined, to *amend* its own records; that is, the journal or the memorial of its own proceedings, kept by the court or its clerk, by *inserting what is omitted*, or striking out what may have been erroneously inserted." The clerk is but the hand or the scribe of the court, and whatever he does, is the act of the court itself. The clerk's docket is the record of the court, until the record is fully extended, and every entry upon it is the statement of an act of the court, which is presumed to be made by its direction, and when so made, the same rules of *presumed verity apply* to such *docket entries* as to the record, when extended; 2 *Cushing*, 115, *Read vs. Sutton*; 1 *Cranch. C. C. Rep.*, 431, *Barnes vs. Lee*; and in *Weighorst's case*, 7 *Md. Rep.*, 450, this court has said, that the docket entries are, "in legal contemplation, made under the eye of the court, and by its authority, and when not properly entered or extended, the error may be corrected."

The other incidental question is, assuming that the verdict was simply a verdict of "Guilty of murder," and that the entry of "Jury polled, guilty of murder in the first degree," was improperly entered, was such a general verdict of guilty *sufficient* to warrant the judgment pronounced in this case? We insist that it was. Our act of 1809, is a copy of the Pennsylvania statute, and it has been decided, in that State, that a general verdict of guilty upon an indictment for murder in the first degree, under their statute, is a sufficient ascertainment of the degree to gratify the act. *White's case*, 6 *Binney*, 183. And such would seem to be the necessary construction of the language of this court in *Weighorst's case*, 7 *Md. Rep.*, 442, *Manly's case*, 7 *Md. Rep.*, 135, and *Flannigan's case*, 6 *Md. Rep.*, 167. The indictment here charges a *wilful and malicious killing*, and the verdict of "Guilty," means that the party is guilty of the murder *as charged*.

For these reasons the State, by her counsel, insists upon an affirmance of this judgment. The objections made by the counsel for the prisoner, go not to the *merits* of the case, but are mere *technicalities*, which the ends of public justice require should be discountenanced by this court. The *affidavits*,

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even if this court could look to them, are entitled to but little weight, for they are made by persons whose attention was necessarily, under the circumstances, attracted to other matters. It was at the close of an exciting and prolonged trial, at night, the court room being crowded with spectators, whose attention was directed to the prisoner, to witness the effect of the verdict upon him. Casual by-standers could not be expected, under such circumstances, to remember minutely what passed between the clerk and the jury, and, by examining their affidavits, the court will see that each differs from the other in his recollection of what then occurred.

J. E GRAND, C. J., delivered the opinion of this court.

This case comes before us on a writ of error sued out by the plaintiff in error, to have reversed and set aside a judgment pronounced against him in the Criminal Court of Baltimore.

From the record transmitted to this court, it appears he was indicted for the murder of a person named Thomas H. Burnham; that he was arraigned, and to the charge pleaded not guilty; that a jury was empaneled to try the case, and they being polled, he was, by their verdict, found "*guilty of the felony and murder above charged and imposed upon him, and that the said felony and murder is murder in the first degree.*"

If this be a correct record of what actually took place, then there is clearly no error to be corrected by the judgment of this court. But it is denied there ever was rendered such a verdict by the jury sworn to try the case, and it is this allegation, on the part of the prisoner, we are now called upon to consider and decide upon.

We know nothing of the testimony adduced to the jury as to the guilt or innocence of the prisoner, nor have we any thing to do with it; that was a consideration exclusively for the court and jury that tried the case below. Our duty and authority are confined to the legal questions arising out of the record. If the record shows the accused was convicted in due form of law, the judgment of the criminal court must be affirmed, and the sentence carried into execution, unless the

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executive interpose. This being the *status* of the case, we proceed to the examination of the questions presented in argument, and by the record.

Homicide at the common law is distinguishable into several kinds; into *murder*, *manslaughter*, *excusable homicide*, and *justifiable homicide*. By our acts of Assembly of 1809, ch. 138, to these distinctions of the common law is added another, namely, murder in the *first* and murder in the *second* degree, and it is to this latter sub-division the principle question for our decision owes its importance. The 3rd section of that act is in the following words:

"And whereas the several offenses which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness, that it is unjust to involve them in the same punishment; therefore be it enacted, that all murder which shall be perpetrated by means of poison, or by lying in wait, or by any kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate, any arson, or to burn any barn, tobacco house, having therein any tobacco, grain, hay, horses, cattle or goods, wares and merchandise; rape, sodomy, mayhem, robbery or burglary, shall be deemed murder in the first degree; and all other kind of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder in the first or second degree; but if such person be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly," &c.

It is apparent, from the plain and unambiguous words of the statute, that where a party is tried before a *jury* on the charge of murder, it is the duty of the jury, if they find such person guilty of the murder, also to "*ascertain in their verdict whether it be murder in the first or second degree.*" This requirement, it was ingeniously urged on behalf of the State, could be fully gratified on an indictment like the one in the case before us, by a verdict of simply "*guilty.*" This view,

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as appears from the opinion of the judge below, was addressed to him as it has been to us. We concur with him in the opinion that the finding of the jury of only "guilty," is insufficient. The argument in its support is deduced mainly from the fact that the charge, as laid in the indictment, is the same as it would be at common law, where there are no degrees of murder, and, therefore, the response by the jury of "guilty," is a full answer, and covers murder in the first degree; and this is sought to be sustained by an *obiter* of Chief Justice Tighlman, in the case of *White vs. The Commonwealth*, reported in 6 *Binney*, 183, and because our act of 1809 is borrowed from that of Pennsylvania of 1794.

The case in which the distinguished chief justice dropped the *dictum* relied upon, did not involve the question, nor call for his opinion on the subject; and were it what counsel suppose it to be, whatever may be our respect for his views on a legal proposition, (and it is certainly very great,) we would not feel ourselves bound to conform to it. Nor, indeed, had it been directly raised in the case, could we, with our understanding of the language of the statute, unite in such construction. But the fact is, we do not concur with the counsel for the State, in the interpretation placed by them on the language of Chief Justice Tighlman. His language is not susceptible of such construction. It alluded to an indictment under the statute, and not at common law. In most of the States of this Union the act of Pennsylvania has been adopted in its very words; and we are not aware of any decision, in any of their courts of last resort, where it has been held not to be incumbent on the jury to find, distinctly and unequivocally, the degree of the murder. So far from it, there has been an unbroken uniformity of decision to the contrary.

We do not deem it essential to recapitulate the numerous cases in which the act has come under review. It is palpable to us that the true intent and purpose of the act, in this particular, were to impose upon the consciences of the jury the finding in *their verdict* (not therefrom to be inferred or conjectured) the degree of the crime; and when that part of the act is considered which refers to the case of the accused making,

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in open court, a confession of guilt, it seems to us next to impossible that, on reflection, there should be any doubt on the mind of any one as to the proper interpretation of it. In the case of the confession by the prisoner, it is the duty of the judge to examine witnesses, with the view of determining the degree of the crime, the commission of which is confessed. Why this, if the view of the counsel of the State be tenable? Most certainly the accused's own confession of "guilty" ought to be equally as strong against him as the finding of the jury of "guilty." And yet it does not dispense with the examination of witnesses to fix the degree. To state the point, is, in our judgment, to resolve the question involved in it. We, however, refer to the opinion of Judge Bartley, in the case of *Dick vs. The State of Ohio*, reported in *3 Ohio*, 89, N. S., for a very clear and satisfactory determination of it.

Having, to our own satisfaction, settled the character of the finding which the act of Assembly requires in the case of conviction for murder, we proceed to notice some facts contained in the transcript of the clerk of the criminal court.

The verdict in the case, whatever it was, was rendered on the 4th of October 1858. On the *rough minutes* of the court appears the following entry: "Oct. 4, 1858, verdict, guilty of murder. Jury polled—Guilty of murder in the 1st degree." From affidavits filed in the case in the court below, it is obvious the words "jury polled—guilty of murder in the first degree," were not placed on the minutes until the 5th of October, out of the presence of the prisoner and of the jury. Some of the bystanders, at the time of the rendition of the verdict, and the deputy clerk, who received it, make affidavit as to the words of the verdict, and the manner in which it was delivered and recorded.

The jury who tried the case also filed a certificate, stating their recollection of the words used, and their understanding of their meaning. To all this the judge certifies, in his opinion, his knowledge of what occurred. Without quoting the precise words used by the different persons who bear evidence in regard to the matter, we content ourselves by saying, that *there is not a single affiant or witness who states, nor does the*

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*judge* state, that *each* and *all* of the jury, when *polled*, found a verdict of guilty of murder in the first degree. It is clear that the foreman *alone* found such a verdict; all the rest simply responded "guilty," saying nothing of the degree of the murder. The object of a poll of the jury, is to call on *each* juror to answer for himself, and in his own language. In the case now under consideration, if we can look to the evidence, such was not, nor does any one pretend it was, done. But it is said, we cannot look to the affidavits, *because* they are no part of the record, and that inasmuch as the extended or amended record is in due form, there cannot be any error of which this court can take notice, revise and correct.

Whatever doubt there may be in regard to the truth of the proposition, to the extent insisted upon, it is unquestionably correct to aver that *jurors* cannot be allowed to testify in relation to the motives upon which they joined in the verdict, and this is just what has been attempted here. (See 5 *Bacon's Abridgement*, 393, (*N.*) and the numerous authorities there collected, and also the opinion of Judge Archer, in the case of *Bosley vs. The Chesapeake Insurance Co.*, 3 *G. & J.*, 473.) If a jury, through mistake or partiality, deliver an improper verdict, the court may, *before it is recorded*, desire them to reconsider it. They cannot, however, be allowed to make alteration after the verdict is recorded. (*Dearsby's Criminal Process*, 68; 81 *Law Lib.*) And we here remark, that when the jury be asked if they have agreed on their verdict, and they respond that they have, and that their foreman shall say for them, and the foreman, *speaking for the whole panel*, find a proper verdict, and the same be recorded, the whole panel being called upon to *hearken to it* as the court hath recorded it, and no objection being made, either by any of the jury, or the counsel for the State or prisoner, then such proper verdict, as given through the foreman, is the verdict of the whole panel, and it is too late, after the record of it, under such circumstances, for any of them to alter or amend it; it is then too late to poll the panel.

It might be conceded, for the purposes of this appeal, that this court cannot take cognizance of the affidavits filed subse-

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quently to the verdict, and yet there may be sufficient, independently and outside of them, in the record, to require it to arrest the judgment. And this is our opinion of it, which relieves us from the necessity of inquiring into our right to weigh the evidence of the witnesses. We have carefully examined all the authorities cited at the bar, as well as others, and we have been unable to find any which precludes us from reversing the *judgment* of the court below, although there are many which deny to us the right to review its *reasoning* and *mere opinions*. Whatever assumes the solemnity of a *judgment* of a court of record, is part and parcel of the *record*, and examinable in the appellate tribunal on a writ of error. Not one of the cases cited on the part of the State, and so earnestly enforced by its counsel, questions, in any manner, this principle.

In all cases in which a judgment is to be pronounced in the progress of the case, such judgment, when rendered, becomes the act of the court, and is a matter of law, as well as were the premises on which it was rendered, matters of fact; and whilst the court of review cannot find the *facts*, yet when the facts are found by the court or the jury below, as the case may be, it is but its proper and legitimate province to see that the inferior court has pronounced correctly the *law* as applicable to the facts.

*Now what was the matter on which the court below decided?* It was alleged that the jury had not, in point of fact, found the verdict which the clerk had recorded, and whether they had, or had not, was the *precise* and *only* matter which the court was called upon, not argumentatively, but *judicially*, to adjudge. And what did it adjudge? We throw out of view entirely all that was said by the witnesses and the clerk, and confine ourselves exclusively to the decision of the judge. It is in these words: "The court will finally proceed to consider the fact, whether the jury did, or did not, find the prisoner guilty of murder in the first degree, which (as Mr. Nelson says) settles the question. When the jury came into court, it was late in the evening, and Mr. Whitney, the prosecutor, was absent, on account of sudden indisposition, but the court supposed he was present to attend, as usual, to the rendition of

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the verdict, according to the usual manner. The clerk asked the jury if they had agreed upon their verdict, and who should say for them, to which they responded they had agreed, and their foreman should say for them. Whereupon the clerk told the prisoner, calling by name William G. Ford, to stand and hold up his right hand, and requested the jury to look upon him, and then asked the jury: ‘How say you, gentlemen, is Wm. G. Ford, the prisoner at the bar, guilty or not guilty?’ To which the jury answered, ‘Guilty,’ and nothing more. Whereupon, and before any of the jury had left the bar, and whilst the prisoner was before them, Mr. Hack, one of the counsel for the prisoner, demanded that the jury should be polled. Whereupon the court directed Mr. Schley, the clerk, who was taking the verdict, to ask the jury, when he polled them, ‘Whether they found the prisoner guilty of murder in the first degree, or murder in the second degree?’ To which question, when it was put to the jury, the foreman answered for the jury, in the words, ‘Guilty of murder in the first degree,’ in an audible voice; and each of the remaining eleven jurors, when polled, responded, ‘Guilty,’ without specifying the degree of murder in words.”

Thus, then, we see the judge below decides the facts to be, that *at no time did all* the jury find the prisoner “guilty of murder in the first degree.” At first their foreman simply said, “guilty,” for the whole panel; and when the latter was polled, so that *each* might answer for himself, eleven of them replied, severally, “guilty,” *without specifying the degree in words*. Here, then, we have the fact plainly set forth, that William G. Ford was not, by all the jury, found guilty of murder in the first degree; but, nevertheless, the verdict, as extended and amended by the clerk of the criminal court, says he was so found guilty. And we are asked to decide that, although no such verdict was given, the judgment is correct, and the sentence should be carried out, and that we cannot look to the misprision of the clerk. The clerk is but the hand of the court, its amanuensis. It is his duty, in contemplation of law, to record nothing but the proceedings of the court.

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The 19th article of the Declaration of Rights of Maryland, among other things, declares, that *every man* hath a right to be informed of the accusation against him, "and to a speedy trial by an impartial jury, *without whose unanimous consent he ought not to be found guilty.*" And in 10 *Bacon's Abridg. Title Verdict*, 306, it is correctly said: "The verdict is the *unanimous* decision made by a jury and reported to the court, on the matters lawfully submitted to them in the course of the trial." *Unanimity* is indispensable to the sufficiency of the verdict, and this, we have seen, has not been in the case before us. It will hardly be contended, that had the jury found the prisoner "*not guilty*," if the clerk had entered their verdict "*guilty*," instead of the true finding, that there is no mode of correcting such error. *Wherein does this supposed case differ in principle from the case now before us?* In nothing. The law says, that when a person shall be found guilty of the crime of murder, by a jury, the jury *shall, in their verdict*, find the degree; and this has not been done.

In the eye of the law, there has been no valid and sufficient verdict; and, as a consequence, there must be a new trial. This case is not like that of *Cochrane vs. The State*, 6 *Md. Rep.*, 400, where there was a necessity to find a new indictment, because of the defect in the one on which the accused was arraigned and tried. In this case there is no defect in the indictment, and the party can be tried again on it, as in the case of *The State vs. Sutton*, 4 *Gill*, 494. This was a mistrial, and a *venire de novo* must be awarded.

*Judgment reversed and procedendo awarded.*

(Decided January 24th, 1859.)

**GUSTAVUS BEALL vs. GEO. A. PEARRE, Adm'r of  
ABRAHAM BROWN.**

A verdict and judgment upon the merits, in a former suit, is, in a subsequent suit between the same parties, where the cause of action, damages or demand is identically the same, conclusive against the plaintiff's right to recover, whether *pleaded* in bar, or *given in evidence* under the general issue, and such prior verdict and judgment need not be pleaded by way of *estoppel*.

The decision of *a court* upon a claim in a former action, is as effectual a bar to a recovery in another suit, upon the same cause of action, as that of *a jury*; and the fact that the court's decision was *wrong*, does not give the injured party the right to bring another suit upon the same claim, for he might have *appealed*, and had the error corrected.

As between the original parties to a bill or note, the total or *partial want* or *failure* of consideration, may be relied on as a defence, and a partial failure avoids the note only *pro tanto*.

In a suit upon a promissory note, the maker, as a defence, relied upon and gave evidence of a *breach of warranty* in relation to certain barrels of beef, for which the note was given. The court, by an *instruction given to the jury*, decided *against* this defence, and the *verdict* and judgment were in favor of the plaintiff, for the full amount of the note. *HELD:*

That this decision by the court, though *erroneous*, upon the defendant's *claim*, was a bar to a subsequent action by him against the plaintiff, upon the same *breach of warranty*; for having failed to *correct* the error by *appeal*, he is not entitled to relief in a new suit.

An instruction to the jury, that if they believe "that the beef, in the declaration mentioned, was deposited with the plaintiff, to be sold on commission, then their verdict *must* be for the defendant," is erroneous, because nothing is said of the *terms* on which the jury might have believed the deposit was made.

**APPEAL from the Circuit Court for Allegany county.**

This was an action on the case brought on the 5th of September 1855, by the appellant against the appellee, to recover damages for an alleged breach of warranty in relation to sixty-nine barrels of beef, alleged to have been sold by the defendant's intestate to the plaintiff, in February 1846. The counts in the declaration, as well as the agreements of counsel, are fully stated in the opinion of this court. Pleas, *non assumpsit*, limitations, and *plena administravit*.

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*1st Exception.* The *plaintiff*, to support the issue on his part, under the agreement of counsel, read to the jury the evidence taken in a *former suit*, brought on the 19th of March 1847, by Brown against Beall, upon a promissory note, as found in the printed record in the chancery case of *Beall vs. Brown*, and then offered some additional testimony by witnesses who were examined in the former suit at law, relating, however, to the same matters involved in that suit. The *defendant*, to support the issue on his part, offered in evidence the proceedings, and verdict, and judgment, including the evidence set out in the bills of exceptions in the *former suit* at law on the note, and all the papers in that cause, including the *prayers* granted and rejected by the court, and also the agreement of counsel as to the pleadings. The defendant also offered in evidence the bill in chancery in the case of *Beall vs. Brown*, and the answer of Brown to the bill, and the exhibits and all the evidence in that case. The *evidence* and the *proceedings* in both these former suits, are sufficiently stated in the opinion of this court. The plaintiff then asked the court to instruct the jury, in substance, as follows:

1st. If the jury shall believe, from the evidence in the cause, that, on the trial at law between Brown and Beall, on the note in the case offered in evidence in this suit, Brown, by his counsel, insisted before the court and jury, that he had sold the beef in controversy to Beall, and had not left it with Beall to be sold on commission; and if they further believe that the jury found or believed that Brown had so sold the beef to Beall, and had not left it with him to be sold on commission, the defendant in this case cannot be permitted to deny that he did so sell the beef to Beall, and that it was not left by Brown with Beall on commission, because such a defence would impute to the present defendant, himself, a fraud upon the administration of justice in this court.

2nd. If the jury shall believe, from the evidence in the cause, that, in the trial of the case of *Brown vs. Beall*, in this court, on the note now offered in evidence, Brown, by his counsel, insisted and maintained before the court and jury, that he had sold the beef to Beall, and had not left it with

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him to be sold on commission, and that Brown, by his counsel, prayed the court to instruct the jury as follows, (here Brown's two prayers granted in the former trial, and set out in the opinion of this court, are inserted,) and that the court, in that trial, granted said prayers, and so instructed the jury; and if they shall further believe that the jury, in said suit on the note, believed and found, in making up their verdict in that case, that Brown had sold the beef to Beall, and that the beef was of some value, and that Beall, the then defendant, after he discovered that the representations so made to him, as stated in said prayer, were not true, dealt with the beef as his own, and sold it without returning the same, or offering to return it, to Brown, and that the jury, in that case, found a verdict for the full amount of the note and interest, that then the verdict and judgment in that case, on the note, does not preclude the plaintiff from recovering in this case.

3rd. If the jury believe, from the evidence in the cause, that the defendant's intestate sold the beef mentioned in the declaration to the plaintiff, and warranted it to pass as beef No. 1, in Baltimore market, with the *bona fide* expectation that the plaintiff would be able to sell it as beef No. 1 quality, and undertook and promised that if the plaintiff should not be able to sell as beef No. 1 quality, or at a price equal to the price at which the plaintiff had bought it, that he would be answerable to the plaintiff, and pay and make up to him any loss he might sustain on the beef, then the plaintiff's proper remedy upon such warranty, promise and undertaking, for the default of the defendant's intestate in the premises, is by suit, and that his right to recover in any such suit was not involved in the issue or issues in the suit heretofore brought by the defendant's intestate against the plaintiff, to recover the amount of the promissory note which the plaintiff had given him for the balance of the purchase money; and notwithstanding the recovery had by the defendant's intestate in his suit, against the plaintiff on said note, the plaintiff is not precluded from rerecovering, in the present action, such damages as the jury shall believe, from the evidence, the plaintiff sustained, in consequence of any breach of the aforesaid warranty by the defendant's intes-

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tate, and of any default by him in his aforesaid promise and undertaking.

4th. If the jury believe, from the evidence, that the defendant's intestate was a citizen of Virginia at the time he sold the beef, in the declaration mentioned, to the plaintiff, and that immediately after the sale, he returned to Virginia, beyond the limits of Maryland, until the time of his death, and that after making such sale, he was never afterwards within the limits of Maryland, excepting the time when he came as a suitor to attend the trial of a case heretofore pending in this court, wherein he was plaintiff and Beall was defendant, and that he only remained in this State whilst he was attending the term of the court at which such trial was pending, and that immediately after the jury had rendered their verdict in that trial, he returned to his home in Virginia, and there remained continuously till his death, then the defendant is not entitled to the defences set up by the pleas of limitations filed in this cause, unless they shall believe that the defendant's intestate, instead of returning to his home aforesaid, within a reasonable time after the conclusion of said trial, tarried and remained in this State over such reasonable time, and longer than it was necessary for him to prepare for and make his return journey; or unless they shall believe that more than three years have elapsed since the granting of letters of administration to the defendant on the estate of said intestate, and the commencement of this suit.

The defendant then offered the following prayers:

1st. If the jury shall believe from the evidence in the cause, that the defendant's intestate was within this State at the time of making the contracts, as stated in the first and second counts of the plaintiff's declaration, (if they shall believe such contracts to have been made,) and remained in the State a sufficient time to afford the plaintiff an opportunity of effectually suing him, and that the plaintiff was aware of such presence of said Brown in this State, and that more than three years have elapsed from the time of making said contracts to the time of Brown's death, then the plaintiff is barred by limitations, from recovering against the defendant under said first

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and second counts, even though the jury should believe from the evidence, that Brown, at the time of making such contracts and continuously up to the time of his death, resided beyond the limits of Maryland.

2nd. If the jury shall believe from the evidence in the cause, that after the causes of action mentioned in the declaration in this case accrued, Brown was in Maryland, attending the sitting of Allegany county court, at the trial of the cause, on the note now in evidence in this case, long enough to have been served with process, in any suit that might have been brought by Beall against him, and that Beall knew of such presence of Brown, then this action is barred by the statute of limitations.

3rd. If the jury believe from the evidence, that Brown was present in Maryland at the time of making the contracts, as stated in the first and second counts of the plaintiff's declaration, (if they shall believe such contracts to have been made,) and that more than three years elapsed from between the making of them and Brown's death, then the plaintiff is barred by limitations, from recovering in this cause under said first and second counts.

4th. If the jury shall believe from the evidence in the cause, that Brown, in 1847, brought an action against Beall in Allegany county court, and that said action was tried in said court in 1849, and that the cause of action, pleadings, agreement, evidence and instructions of the court, as offered in evidence by the defendant in this cause, were the same cause of action, pleadings, agreement, evidence and instructions in that case, and that the jury in that case found a verdict for Brown, for the entire amount of the cause of action in that case, and that judgment was rendered on said verdict by the court, and if the jury shall believe that the beef, and the contract and bargain in relation thereto, are the same mentioned in the evidence, both in that case and in this, then such a state of facts is a bar to the recovery in this cause.

5th. If the jury shall believe the facts as stated in the preceding prayer, (made a part of this,) then the plaintiff cannot recover in this case, on the third count in the declaration.

The court (PERRY, J.,) granted the plaintiff's *second* and

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the defendants *first* prayer, and rejected all the others on both sides, and the plaintiff excepted to the refusal to grant his *first*, *third* and *fourth* prayers, and to the granting of the defendant's *first* prayer.

*2nd Exception.* After the argument of the case had been closed, and the jury was about to leave the box, the court, in answer to an inquiry made by the foreman, further instructed the jury, that if they should believe from the evidence, that the beef in the declaration mentioned, was deposited with Beall, to be sold on commission, then their verdict must be for the defendant, but if they should believe, that the beef was absolutely sold with warranty, then they might find for the plaintiff. To this instruction the plaintiff excepted, and the verdict and judgment being in favor of the defendant, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and BARTOL, J.

*Thos. J. McKaig* for the appellant:

1st. The appellant's first prayer ought to have been granted. By reference to the answer of Brown in the chancery case, it will be found that it is there admitted, that in the trial at law on the note, Brown insisted before the court and jury, that he had *sold* the beef to Beall, and that the jury so found, by which means Beall failed in his defence to the note. He and his administrator are, therefore, estopped from denying the *sale* in this trial, and setting up a *bailment*. To permit him to do so would be to sanction a fraud upon the administration of justice. In the case of *The Phil. Wil. & Balto. Rail Road Co., vs. Howard*, 13 How., 307, the supreme court decided, that a party who had asserted in a court of justice, that an instrument on which an action of *assumpsit* had been brought against him, was a *sealed* instrument and had defeated the action on that ground, could not be heard in a subsequent action of *covenant* upon the *same instrument* to deny his *seal* to the instrument. The doctrine of that case was adopted by this court in *Scaggs vs. The Balto. & Wash. Rail Road Co.*, 10 Md. Rep., 280.

2nd. The appellant's *third* prayer presents the proposition,

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that Beall was not precluded from recovering, in the present action, damages for the breach of warranty, by the *former suit* on the note. The defendant's fourth prayer puts the reverse of this position, and asserts that the former suit is a *bar* to a recovery in this. In the former suit the court granted an instruction in effect, that if the jury believed the beef was *sold* and was of *some* value, the defendant could not set up as a defence the fact, that the plaintiff made *false representations* to the defendant, as to the quality and condition of the beef *knowing them to be false*, in other words, that there must be a *total failure* of consideration, in order to defeat the plaintiff's recovery on the note provided the transaction was a *sale*. The jury did believe it to be a *sale*, and that the beef was of *some* value, and, therefore, gave their verdict for the plaintiff, for the full amount of the note. It is perfectly manifest from this view of the case, that the defence as to the *breach of warranty* for which this suit is brought, never was passed upon *by the jury* in the former suit. The instruction of the court withdrew it altogether from the consideration of the jury. It was in fact never passed upon by them. The decision of the court was binding upon the *parties to the suit*. It was the judgment of a court of *competent jurisdiction*, and the defendant was not bound to *appeal* from it. The defendant had the right to take it as the *law of the case* and abide by it, and that decision having taken from the jury the consideration of his defence, his proper course was to submit and bring his *cross-action* for damages for a *breach of the warranty*, as he has done. The authorities upon the doctrine of former recovery, do not go to the extent of saying, that a defence, which by the court's instruction has been withdrawn from the consideration of the jury, is so put in issue or decided upon as to prevent a cross-suit by the party whose defence has been so treated. The *pleadings* or the *evidence* must show that the matter was in issue between the parties, and the *merits of the defence* passed upon *by the jury*. There was no *plea of set-off* in the former case, and the *evidence* which was offered as to the breach of warranty, in fact never went to the jury at all, but was ruled out by the instruction of the court. In such a case it would be extremely hard to hold that the present plaintiff is debarred

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a recovery. A meritorious defence never passed upon in a former suit, which, in fact, the court said the jury *could not consider*, may be the subject of another action, and there is no decision in Maryland to the contrary. In the case of *Shifer vs. Stonebraker*, 4 G. & J., 355, it is said, that where a former recovery is *pleaded* by way of *estoppel*, the rule by which the sufficiency of such a plea is to be tested, "is a certain and familiar one. Does it plainly appear, that the fact or right relied on as a bar, was distinctly put in issue *and found by the jury* in a former suit by the same parties?" The *finding by the jury* is necessary to bar the subsequent action, and this must *plainly appear* by the pleadings, when the former recovery is relied on by way of *plea*. Much stronger is the case, and much more certainly must it appear, that the jury by *their finding* passed upon the claim, where it was only offered *in evidence* under the general issue. But here, as I have stated, the evidence shows that not only did the jury by their finding *not pass* upon this claim, but were expressly *forbid* to do so by the instruction of the court.

3rd. The instruction of the court to the jury, after the argument was closed, was clearly wrong, for if the jury found the contract as proved, it mattered not whether it were a sale with warranty, or whether the beef had been received to be sold for Brown, and Beall to keep, for his trouble, all he could sell it for over \$7.50 per barrel. If they found, in either case, that Brown warranted the beef to pass as No. 1 in Baltimore, that Beall had paid for it, and that instead of passing as No. 1 in Baltimore, it was condemned as worthless, or if they found from the evidence, that Brown was to return to Beall, whatever the beef sold for less than \$7.50 per barrel, and the whole brought only \$3.57, or if they found that Beall had advanced \$7.50 per barrel, on the beef, and was, by the contract, "not to lose anything by the operation," why should the fact, that the beef was deposited with Beall to be sold on commission, prevent a recovery in this case?

*J. H. Gordon and Geo. A. Pearre for the appellee:*

The main ground of defence in this case is, that the judgment in the former suit is a bar to the recovery in this. It is

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not necessary that the defence of a former recovery should be *pleaded* either in bar or by way of *estoppel*, but it may be given in *evidence* under the general issue. All that is necessary is, that the cause of action, damages or demand should be identically *the same*, and the parties the same. 4 G. & J., 360, *Shafer vs. Stonebraker*. It is not *the recovery*, but the *matter alleged* by the party, and *upon which the recovery proceeds*, which creates the estoppel. 3 East, 355, *Outram vs. Morewood*. In *Young vs. Black*, 7 Cranch, 565, the defendant offered in evidence a record of a former suit, between the same parties, in which judgment was rendered, supported by *parol proof*, that the former suit was for the same cause of action as the present suit, and the plaintiff denied its admissibility under the general issue, but the court was unanimously of opinion that the objection could not be supported. One great criterion of the identity of the cause of action is, that the *same evidence* will maintain both actions. 2 Wm. Bl. Rep., 831, *Hitchen vs. Campbell*. See, also 1 Starkie on Ev., 262. 2 Smith's Lead. Cases, 442. *Broom's Legal Maxims*, 135. The question of warranty or no warranty was tried in the first suit upon the note, and was available as a defence to that suit, if believed by the jury, and is therefore a bar to this suit, although the ruling of the court in that case was erroneous. The defendant should have *appealed* from that erroneous instruction, and had it corrected, and his failure to do so, gives him no right to bring a new suit. . The case of *Smith vs. Whiting*, 11 Mass., 445, decides that "though the court may have decided wrong in rejecting the evidence in the former suit, yet a new action was not the way to remedy the misfortune. Exceptions might have been filed to the opinion of the judge, or a new trial might have been had upon petition. The very evidence now relied on was offered, and an adjudication had upon it. A rehearing of the same action may be proper, but to sustain a new action, would be to throw all judgments into uncertainty and confusion." In the case of *Wood vs. Jackson*, 8 Wend., 43, 45, 46, Senator Seward has elaborately and ably discussed the whole law relating to former recovery, and placed it on correct grounds. See, also, 3 Cowen, 125, *Gardner vs. Buckbee*. 2 Bing., 377, *Stafford*

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*vs. Clark.* 1 *Greenl. on Ev.*, sec. 534. The cases of *Cline & Francis, vs. Miller*, 8 *Md. Rep.*, 286, and of *Perley vs. Balch*, 23 *Pick.*, 283, show that the law is now settled, that as between the parties to a promissory note, a *partial failure* of consideration may be relied on as a defence. In the latter case it was held, that if the purchaser of a chattel give his note for the price, he may avail himself of a partial failure of consideration, or of deception in the quality or value of the chattel, or of a breach of warranty, to reduce the damages, in an action brought by the vendor upon such note, and he is not obliged to resort to a separate action for the deceit, or upon the warranty. The breach of warranty now sued on, was, therefore, a proper defence to the former action on the note, and it was relied on and *adjudicated* in that case. A former judgment is conclusive, not only as to what was decided, but also as to all that could have arisen in the case. The plaintiff is, therefore, barred from recovering the \$220 as money had and received, because he gave it in evidence at the former trial, relied upon it as a defence, and it was available as a set-off under the agreement respecting the pleadings, if the jury had believed the defence set up. If the position here maintained is correct, the plaintiff is not entitled to a *procedendo*, even if the judgment should be reversed.

*Note.*—The argument on both sides, upon the other questions in the case, is omitted.

ECCLESTON, J., delivered the opinion of this court.

On the 19th of March 1847, Abraham Brown, the intestate of the present defendant, instituted an action of *assumpsit* against the present plaintiff, upon a promissory note for \$289.14.

It was agreed that the defendant might plead *non-assumpsit*, and offer "the special matter in evidence, as fully as if he had specially pleaded the same or given notice thereof to the plaintiff."

The note was given in consideration of a contract in relation to 69 barrels of beef. Brown alleged the contract to be an absolute sale of the beef at \$7.50 per barrel. Beall contended there was no sale, but that the beef was left with him

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to sell for Brown on commission; that it was estimated at \$7.50 per barrel, on account of which, he, Beall, advanced to Brown, in cash, \$220, and gave him the said note; and that Beall was to have all he could sell the beef for over \$7.50 per barrel, and all that it sold for under that price Brown was to make up by crediting the same on the note. It was alleged by Beall, that Brown falsely represented the beef to be of good quality, and that it would pass as No. 1, in Baltimore; whereas it was then *slippery*, (which is the incipient stage of decomposition or decay,) and finally turned out to be so bad, that after diligent efforts to sell the same, the whole only produced \$3.57, beyond the expenses of sales.

Brown claimed the full amount of the note, and offered evidence to support his right to recover the same. Beall offered proof to sustain his defence, which was based upon the allegation, that the note had been given on account of the beef, which, at the time of the contract, the plaintiff falsely represented to be in good condition, and would pass as No. 1 in Baltimore, he then knowing it to be unsound, and Beall being then ignorant of the unsound condition of the beef.

The defendant, Beall, prayed the court to instruct the jury, that if they believed the beef was left with the defendant to sell for the plaintiff, or to do the best the defendant could with the beef; that the plaintiff obtained the note on which the suit was brought, from the defendant, by falsely pretending and alleging that the beef was of good quality, and would pass No. 1 in Baltimore, and that all he wanted with the note was, to show his partner what disposition he had made of the cattle; and that whatever the beef sold for, less than seven dollars and fifty cents per barrel, he would credit on the note; such false representations would be a fraud on the defendant; and if the jury should believe that the defendant, in consequence of such false representations, gave the said note, the plaintiff was not entitled to recover on said note.

This prayer the court refused to give, "upon the ground, that, from the evidence in the cause, it appears that the defendant, after he discovered the false representation, (if any,) acted upon the arrangement made between the parties at the time the note was obtained, and did not elect to return or

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offer to return the beef and rescind the contract, and that he thereby affirmed the contract of bailment, and the plaintiff is entitled to recover upon the note, allowing to the defendant a deduction therefrom, whatever the beef sold for under the sum of \$7.50 per barrel; provided the jury shall believe from the evidence, that the amount the beef sold for, less than the said sum, did not result from the fault or negligence of the defendant; unless the jury shall also believe from the evidence, that at the time the said note was given, the beef was so spoiled or defective that it could not, without the fault or want of diligence of the defendant, be sold for anything."

The alternative intended to be provided for commencing with the word "unless," is not quite so explicitly stated as it might have been; but we understand the meaning of the court in the entire instruction, to be, that looking at the contract as one of bailment, then, in view of the circumstances presented in the first portion of the instruction, if believed by the jury to be true, the plaintiff would be entitled to recover upon the note such balance thereof as should remain, after allowing the defendant a deduction from the amount of the note, for whatever the beef was sold for, less than \$7.50 per barrel; provided the loss on selling the same did not result from the fault or negligence of the defendant; unless the jury believed, that at the time of giving the note the beef was so spoiled or defective, that without fault or want of diligence on the part of the defendant, it could not be sold for anything, and then, as there would be a total failure of consideration, the plaintiff could not recover on the note. In the last contingency mentioned in the instruction, the court must be understood as meaning, either, that the plaintiff was not entitled to recover, or else, as meaning what is equivalent to it, which is, that the defendant was entitled to a deduction from the note for the beef, at \$7.50 per barrel.

At the instance of the counsel for Brown, the court instructed the jury, that if they believed any article, other than the beef, was sold by Brown to Beall, and that such article formed a part of the consideration for which the note in dispute was given, and that such article was of value, then the plaintiff was not precluded from recovering on the note.

The court likewise instructed the jury, at the instance of the  
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plaintiff's counsel, that if they believed the beef was sold and delivered by the plaintiff Brown, to the defendant Beall, and although they should believe that the plaintiff made representations to the defendant as to the quality and condition of the beef at the time of sale, knowing them to be false, yet if they believed that the beef was of *some* value, and that the defendant, after he discovered that the representations so made to him by the plaintiff were not true, dealt with the beef as his own, and sold it without returning the same or offering to return it to the plaintiff; that "such facts did not constitute a defense or bar to the recovery upon the note;" notwithstanding they might believe that at the time of the sale, the plaintiff made such false representations, knowing them to be false.

The verdict and judgment were in favor of the plaintiff, Brown, for the full amount of the note; which judgment was rendered on the 10th day of May 1849.

On the 1st of March 1850, Beall filed a bill on the equity side of Allegany county court, and obtained an injunction against all further proceedings on the said judgment. The bill of exceptions taken on the trial at law, including the instructions granted by the court, was filed as an exhibit with the bill, and after answer and proof, the court below dissolved the injunction and dismissed the bill. From this decision Beall appealed, and this court affirmed the decree. See 7 Md. Rep., 393, *Beall vs. Brown*.

Brown has since died, the present defendant, George A. Pearre, has taken out letters of administration on his estate, and this action has been instituted against him by Beall, to recover damages upon the alleged breach of warranty, in relation to the sixty-nine barrels of beef mentioned in the former suit.

The first count in the *nar.* sets out a sale of sixty-nine barrels of beef, on the 20th of February 1846, to Beall by Brown, the latter warranting the beef to be sound, and that it would pass inspection as No. 1 beef in Baltimore, whereas it was unsound and would not pass inspection as warranted.

The second count alleges, that Beall took the beef to sell for Brown, that Brown warranted and represented the same to be sound, and would pass inspection as beef No. 1 in Baltimore; that Brown falsely and fraudulently induced Beall to

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take the beef from him for sale, and account to him for the same at \$7.50 per barrel; that at the time of the agreement Beall accounted with Brown at the above price, and paid him \$220 in cash, and also gave him his note, at 90 days, for \$289.14, as a further advance on the beef; that Beall was to have for his service and trouble in selling, all he could obtain on the sale, over the sum of \$7.50 per barrel. This count also alleges, that the beef was unsound and spoiled.

The third count charges, that Beall purchased the beef of Brown, at \$7.50 per barrel; that it was agreed that Brown should deliver the beef, and that Beall should accept it, and pay for the same at that price. That at the time of sale Brown warranted the beef to be sound, and that it would pass as No. 1 beef in Baltimore. That Beall was to sell the beef, and retain for himself all he could sell it for over \$7.50 per barrel, for his trouble and service; and whatever the beef should sell for less than \$7.50 per barrel, Brown agreed to repay to Beall, and that he should lose nothing by the operation. It is also alleged, that Brown delivered the beef, and Beall paid him \$220 in cash, and gave him his note for \$289.14; that on the 15th of June 1846, "it proved and was manifest that the said beef at the time of said agreement, and also on the day and year last aforesaid, was and remained unsound and spoiled, and was not of a quality to pass as beef No. 1 in Baltimore." That Beall offered the beef in Allegany county, and failing to sell, he transported it to Baltimore, and made diligent efforts to sell the same, but the beef proved worthless, and he only realized \$3.57 beyond the cost of sales.

The fourth count is for money had and received.

The first plea is, *non-assumpsit*, on which issue is taken.

There are other pleas, but it is needless to mention them, inasmuch as the issue upon the first includes the defence on which the case will be decided.

The following is an agreement made between the parties:

"We agree in this case, that the evidence offered in a former case of *Brown vs. Beall*, in reference to the same subject matter, shall be read and received in evidence in the trial of this case, as taken down in the trial of the said case of *Brown vs. Beall*, including the letters of Sewell, Janney and Owings,

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with all papers and accounts as received in said trial, subject to the same exceptions, which either party could have made to the said evidence at the trial when it was taken. The said letters of Sewell, Janney and Owings, to be received in evidence, as they were on the said trial. Either party shall be at liberty to offer such other testimony as he may deem proper and shall be admissible by the same or other witnesses."

The parties also agreed, "that the clerk of the Circuit court for Allegany county, in making out the record for the Court of Appeals, shall not copy out the proceedings in the chancery case of *Beall vs. Brown*, which went to the Court of Appeals, as mentioned in the bill of exceptions; but shall insert in the record this agreement, and the record of said case in the Court of Appeals, shall be used as though it were fully set out in the record; neither shall the clerk of the Court of Appeals, in copying this present record insert the said chancery case."

Beall, the plaintiff, read the evidence taken in the case of *Brown vs. Beall*, in the suit upon the note, as found in the printed record in the chancery case of *Beall vs. Brown*. He also gave some additional evidence, by two of the witnesses who were examined in the former case at law. Their additional evidence, however, relates to the same matters involved in that suit.

The present defendant offered in evidence the proceedings and verdict and judgment, including the evidence set out in the bill of exceptions, in the case of *Brown vs. Beall*, on the note, and all the papers in said case, including the agreement of counsel as to pleadings.

As a ground of defence to the present action, the appellee says, the plaintiff claims damages for an alleged breach of warranty, in regard to the quality and condition of the beef in dispute; when it is manifest that the same breach of warranty was relied upon by him as a ground of defence in the former suit against him, on the note. It is insisted that the claim now presented, was made as a defence in the former case, was considered and decided adversely to Beall, and, therefore, he cannot now recover upon such a demand.

It is not pretended that any issue made by the pleadings shows that this question upon the warranty was presented, but it is alleged the evidence shows that it was presented and de-

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cided. If this be true, it is a good defence. In *Shafer vs. Stonebraker*, 4 G. & J., 360, the court say: "We conceive, therefore, it may be stated as a general rule, that a verdict and judgment upon the merits in a former suit, is, in a subsequent action between the same parties, where the cause of action, damages or demand is identically the same, conclusive against the plaintiff's right to recover, whether pleaded in bar or given in evidence under the general issue, where such evidence is legally admissible; and that such prior verdict and judgment need not be pleaded by way of estoppel." See, also, *Gerratt vs. Johnson*, 11 G. & J., 173, 182.

In reply to this ground of defence, Beall says, although the proof may show that he gave evidence to support his defence in the former suit, on account of a breach of the warranty, yet, whether he was entitled to such a defence, by his proof, never was submitted to, or decided by, the jury. They were instructed, that if they believed the beef was *sold and delivered* by Brown to Beall, and it was of *some* value, then, although the former may have made false representations in regard to the quality and condition of the beef, knowing them to be false, and Beall dealt with it and sold it as his own, he could not claim any deduction from the amount of the note. The court held the rule of law to be, that in a suit upon a promissory note, the maker could not reduce the note by proof of a partial failure of consideration. Such being the law, as announced by the court, and the jury having given a verdict for the full amount of the note, the present plaintiff assumes that the jury decided the contract in relation to the beef was a *sale*, and consequently they never did decide upon the merits of his defence, in the former suit; the instruction of the court having withdrawn from them any consideration of a question in reference to a breach of warranty, in the event of their finding the contract to be a *sale*, that the beef was of *some* value, and that he, Beal, dealt with it as his own, and sold it, without returning or offering to return it. Under these circumstances Beall's counsel insists, that in the rendition of the former verdict, it not only does not appear that the jury passed upon the merits of his present claim, but it appears they did not. Admitting (without deciding) this to be true, why was it so? The

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answer given to this question by the party is, that the decision of the court necessarily withdrew the consideration of this claim from the jury. If, therefore, the jury did not, the court did, decide upon it. And we can see no good reason why a decision of a court upon a claim in a former action, is not as effectual a bar to a recovery in another suit, upon the same cause of action, as that of a jury.

The ruling of the court, we think, was erroneous. If the note was given for the beef, although the contract was a sale, yet the maker of the note had a legal right to insist upon either a total or partial want or failure of consideration, in defence, according to the extent of his proof. *Cline & Francis, vs. Miller*, 8 Md. Rep., 285, 286.

If, however, the court gave a wrong instruction, that could not confer upon the injured party the right to bring another suit upon the same claim. He might have appealed, and had the error corrected.

In *Smith vs. Whiting*, 11 Mass. Rep., 445, it was held, that a second action cannot be maintained upon evidence once offered and rejected in the trial of a like action between the same parties. Speaking for the court, C. J. Parker says: "Although the court may have decided wrong in rejecting the evidence in the former suit, yet this is not the way to remedy the misfortune. Exceptions might have been filed to the opinion of the judge, or a new trial might have been had." And it is likewise said: "In the case at bar, the very evidence now relied on *was* offered, and an adjudication had upon it. A rehearing of the same action may be proper; but to sustain a new action, would be to throw all judgments into uncertainty and confusion."

In *Grant vs. Button*, 14 Johns. Rep., 377, it was decided by the Supreme Court, in New York, that "matter which was properly offered as a defence in a former action, and rejected, cannot be made the subject of a new suit."

The law is adverse to multiplying suits; and if a party has a choice between two actions upon the same demand, and he selects one, which is decided by a competent tribunal, either for or against him, as a general rule, he will not be permitted to resort to the other.

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Beall's counsel has insisted, through the whole course of his argument, that in consequence of the instruction given by the court upon the theory of a sale, the jury certainly decided the contract in relation to the beef, to be a sale. They may have done so. But it is not perfectly certain they did. The court's instruction, provided they believed Beall was to sell the beef for Brown, did not take from the jury the consideration of the proof on the subject of warranty; on the contrary, it expressly authorized them to make such deduction from the note as the evidence in relation to the warranty would satisfy them was proper to be allowed. The court having submitted to them the inquiry, whether Beall received the beef to sell for Brown, and in case of their believing he did, then the inquiry, what deduction from the note Beall was entitled to on account of the warranty, it cannot be considered as free from all doubt that the jury decided the contract to be a sale to Beall. And if they found that he received the beef to sell for Brown, they could not have rendered a verdict for the full amount of the note, (as they did,) without *deciding upon*, and adversely to, Beall's claim for any allowance on account of the alleged breach of warranty.

The verdict, however, may have been rendered by the jury, believing the contract was a sale. And if they so believed, then the instruction of the court on that hypothesis, was a decision upon, and adverse to, the claim of Beall, which authorized the jury to find a verdict for the former plaintiff's entire claim, allowing no part of that of the defendant. We, therefore, think, that in whatever aspect the former suit can be properly viewed, it does appear that Beall's claim, upon the same breach of warranty now sued upon by him, was decided. That it was put in issue, has not been, and cannot be, denied. Nor has it been pretended that, in any stage of the proceedings, any application or effort was made to withdraw the claim.

If there was a warranty, and a breach of it, Beall had a legal right to avail himself of such a claim, in the first suit, by way of recoupment, in opposition to the note, even if the beef, for which it was given, was of *some* value, provided the jury believed the value of the beef included in it was less than the

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amount of the note. And if Beall was denied his right to recoupment in consequence of an erroneous instruction from the court to the jury, he might have corrected that error by appealing. Having failed to seek the redress which the law afforded him, he is not entitled to relief in a new suit.

It will be seen that the claim relied upon by the former defendant was an entirety, and not consisting of different elements or items, depending upon different proof. It was based upon an alleged breach of warranty, the damages for which were unliquidated. And those damages, if the defendant was entitled to any, could not, with any degree of certainty, be assumed to be the difference between the price of the beef agreed upon originally, and the price or amount for which it was finally sold. For among other considerations, in estimating the damages, it would be proper for the jury to ascertain whether any, and, if any, what amount of loss on the final sales, resulted from negligence or want of care on the part of Beall. The rejection of such a claim by an adverse decision, precludes any recovery upon it in a subsequent suit between the same parties.

In the present suit, the court instructed the jury, "that if they should, believe from the evidence, that the beef in the declaration mentioned was deposited with Beall to be sold on commission, then their verdict must be for defendant; but that if they should believe that the beef was absolutely sold with warranty, then they might find for plaintiff."

There was error, we think, in giving this instruction. By it the court told the jury they *must* give a verdict for the defendant, if they believed the beef was deposited with Beall to be sold on commission; and this they were told without any thing being said in reference to the terms on which they might have believed the deposit was made.

For this error the judgment will be reversed. But having come to the conclusion that the now plaintiff cannot recover in this action, there will be no *procedendo*. It is, therefore, needless to examine the other questions presented in the record.

*Judgment reversed, and no procedendo awarded.*

(Decided January 26th, 1859.)

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## ADMINISTRATOR PENDENTE LITE.

1. An administrator *pendente lite* is responsible to the orphans court so long as he holds the letters, and that court has *adequate powers* to protect the interests of those concerned in the faithful performance of his duties, and a *court of equity* has no right to interfere with him, or with the funds in his hands belonging to the estate. *Lee & Wife vs. Price, et al.*, 253.

## AGENCY, AGENT.

1. A wife living in a state of separation from her husband, cannot be regarded as his *agent*, and has no authority to bind him by any *contract*, except for necessaries: she cannot *authorize another* to enter his house, and take therefrom the household furniture. *Schindel vs. Schindel*, 108.
2. So far as *good faith* in obtaining the insurance is concerned, a policy issued "for whom it concerns," stands on the same ground as any other; for every such policy *supposes an agency*, and one who claims the benefit of it, is *bound* by the *acts* and *representations* of the parties or agents connected with the business of *procuring it*, although obtained without his knowledge. *Augusta Ins. & Banking Co., vs. Abbott*, 348.

*See* PRINCIPAL AND AGENT.

FACTORS.

BROKERS.

## AGREED STATEMENTS OF FACTS.

1. In criminal cases where fines or penalties are imposed, an *appeal* will lie upon questions of law *apparent on the record*, and such questions sufficiently appear on the record, where the defence is presented in the court below by an *agreed statement of facts*. *Keller vs. The State*, 322.
2. Such agreed statements of facts, serve the same purposes and are governed by the same principles, and, by the practice in this State, have almost entirely taken the place of, *special verdicts*; like such verdicts their effect is to place the facts on the record as part thereof, and the court decides thereon as *on demurrer*. *Ib.*
3. The act of 1825, ch. 117, does not apply to demurrs and motions in arrest of judgment, nor to cases of agreed statements of facts.

*Ib.*

## AGREEMENT.

1. An act of Assembly was passed, authorising a county court to grant an appeal to the *plaintiff*, in a case in which the judgment was in favor of the *defendant*, and to incorporate into the record the same exceptions which had been taken in *another* and similar case, tried in the same court, an appeal in which was then pending. The exceptions were accordingly signed, and the case prepared for the Court of Appeals, but before the record was sent up, the *other case* was reversed and sent back under *procedendo*, and tried again and new exceptions taken. An *agreement* was then made by the parties to *reinstate* the *first case*, in order that these new questions might be raised in this case also, and it was "*agreed*, that if the proceedings of the county court in signing the exceptions, should be deemed by the Court of Appeals void, by reason of the *unconstitutionality* of the act of Assembly by which they were authorized to be signed, then the *appeal in said case shall be dismissed*, otherwise it shall be heard and determined on the questions of law raised in the *other case*." The case was reinstated and a verdict

**AGREEMENT—Continued.**

and judgment rendered for the plaintiff, and the defendant appealed, and the record with the above agreement sent to the Court of Appeals, which decided the act unconstitutional and dismissed the appeal. The plaintiff then attempted to enforce the last judgment in his favor by *scire facias*, insisting that the dismissal of the appeal left that judgment in full force. This attempt the defendant resisted, both by plea to the *sci. fac.*, and by motion to strike out the judgment, insisting, that by the above agreement the judgment was to be void, if the act of Assembly was declared unconstitutional, HELD:

That this defence was not the subject matter of a plea *at law* to the *scire facias*, but that the defendant is entitled to relief against the judgment in *equity*, the design of the agreement being, to prevent the plaintiff from proceeding on his judgment, if the act of Assembly was declared unconstitutional. *Miller's Heirs & Terre-tenants vs. State, use of Fiery,* 207.

*See AGREED STATEMENTS OF FACTS.*

**JUDGMENT**, 5.

**PLEAS AND PLEADING**, 1, 2.

**ANSWER.**

1. A party submitting to answer must answer fully and frankly, and he who evidently and purposely holds back something, cannot complain if he find himself regarded with suspicion and distrust, and be refused that to which he may in truth be entitled, and under other appearances might have obtained. *Keighler, et al., vs. Savage Manf. Co.*, 383.
2. According to the chancery practice of this State, the motion to dissolve an injunction, and exceptions to the answer, are heard and decided at the same time. *Ib.*
3. Where an answer refers to a *paper* as showing the dates and amounts of receipts from certain collaterals in the defendants' hands, to a correct and detailed statement of which the complainant was entitled, and such *paper* does not appear in the record, an exception for insufficiency in this particular must be sustained. *Ib.*
4. An appeal will not lie from an order granting or refusing to dissolve an injunction, until *answer* filed, and an *insufficient answer* is no *answer* for the purpose of an appeal, but it is for *this court*, and not the court below, to judge of the *sufficiency* of the answer, it being for the *appellate court* alone to determine when an appeal will lie. *Ib.*

**ANTE-NUPTIAL AGREEMENT.**

*See HUSBAND AND WIFE*, 3, 5, 6, 7.

**APPEAL AND ERROR.**

1. The *amount* of the valuation, under the act of 1809, ch. 138, sec. 21, of a slave convicted of a felony, is a matter within the *discretion*

## APPEAL AND ERROR—Continued.

- of the court in which the case is tried, and, therefore, is not the subject of an appeal or of revision by the Court of Appeals. *Robinson vs. Commissioners of Harford County*, 132.
2. The owners of such slave have no right to appeal from any action of the court in reference to the *sentence* of the negro, the State and the negro being the *only* parties who can ask the appellate court to review *such action*. *Ib.*
  3. An appeal from the orphans court must be taken within *thirty days* after the decree, order, decision or judgment appealed from was passed, as required by the act of 1818, ch. 204, otherwise the appeal will be dismissed. *Porter Ex'r of Earlougher, vs. Timanus, et al.*, 280.
  4. Under the act of 1831, ch. 315, the orphans court is clothed with a *discretion* to pass an order requiring an executor to bring money in his hands into court, and, upon failure to comply, to revoke his letters, and when that court has exercised such discretion, its decision is *final*, and no appeal lies therefrom. *Ib.*
  5. A party cannot be convicted after the law under which he may be prosecuted has been repealed, though the offence may have been committed before the repeal, and the same principle applies where the law is repealed or expires pending an appeal or writ of error from the judgment of an inferior court. *Keller vs. The State*, 322.
  6. The judgment in a criminal case cannot be considered as final and conclusive to every intent, notwithstanding an appeal or writ of error; execution of the sentence is not stayed if the State chooses to proceed on the judgment, but if the judgment is reversed, such reversal operates to discharge the prisoner from punishment. *Ib.*
  7. In criminal cases where fines or penalties are imposed, an *appeal* will lie upon questions of law *apparent on the record*, and such questions sufficiently appear on the record, where the defence is presented in the court below by an *agreed statement of facts*. *Ib.*
  8. An appellate court in disposing of an appeal or writ of error, must decide according to existing laws at the time of the final judgment. *Ib.*
  9. The refusal of the court in a trial of a cause at *nisi prius*, to permit counsel to read to the jury the law from books, is a matter within the *discretion* of the court, and is not a subject of appeal. *Augusta Ins. & Banking Co., vs. Abbott*, 348.
  10. Where the court below refused to consider reasons for a new trial because not filed within the time required by the *rules* of court, such decision cannot be reviewed on appeal. *Hughes vs. Jackson*, 450.
  11. An appeal will not lie from an order granting or refusing to dissolve an injunction, until *answer* filed, and an *insufficient answer* is no *answer* for the purpose of an appeal, but it is for *this court*, and not the court below, to *judge of the sufficiency* of the answer, it being for the *appellate court* alone to determine when an appeal will lie. *Keighler, et al., vs. Savage Manf. Co.*, 383.

**APPEAL AND ERROR—Continued.**

12. Whatever assumes the solemnity of a judgment of a court of record, is part and parcel of the record, and examinable in the *appellate tribunal* on a writ of error. *Ford vs. The State*, 514.
13. Whilst the appellate court cannot find the *facts*, yet the judgment of the inferior court on those facts is a *matter of law*, and where the facts are found by the court or jury below, it is the proper and legitimate province of the appellate court to see that the inferior court has pronounced correctly the *law* as applicable to the facts. *Ib.*
14. Where the judge of an inferior court, in his *decision*, embodied in the transcript of the record sent to the appellate court, *sets forth* the *facts* occurring upon the rendition of a verdict in a trial for murder, and these facts show that *all the jury did not at any time* find the prisoner “guilty of murder in the first degree,” the judgment of the court, upon such verdict, sentencing the prisoner to be hanged, may be reviewed by the appellate court on writ of error, notwithstanding the *docket entries* of the court below, both original and as *extended* in the transcript, show a verdict in due form, of “guilty of murder in the first degree.” *Ib.*
15. In such a case, the appellate court may look to the misprision of the clerk, who is but the hand of the court, and whose duty it is, in contemplation of law, to record nothing but the proceedings of the court. *Ib.*

*See PRACTICE IN THE COURT OF APPEALS.*

**ASSIGNMENT, ASSIGNOR AND ASSIGNEE.**

1. Where an order is drawn for the *whole* of a particular fund, it amounts to an *equitable assignment* of that fund, and, *after notice* to the drawee, it binds the fund in his hands. *Wilson & Co., vs. Carson & Co., Garnishees of Webb, Marx & Co.*, 54.
2. But an order either on a general or particular fund, for a *part only*, is not an assignment of that part, nor does it give a *lien* thereon as against the drawee, until he *consents* to the appropriation by *accepting* the order, or an *obligation to accept* may be fairly implied from the custom of trade, or the course of business. *Ib.*
3. An action was brought on a single bill in the name of the obligee, as *legal plaintiff*, for the *use* of his *assignee*, as the equitable plaintiff. The declaration was in the usual form of *debt*, the obligee being named therein as plaintiff. The obligor, the defendant, pleaded *payment* “to the said plaintiff,” and on this plea issue was joined. HELD: That the defendant could offer, in support of this issue, a receipt showing that he *had paid* the bond to *the obligee*, though such payment was made *after*, and with full *notice* of, the *assignment*; the *cestui que use*, instead of *taking issue* on the plea, should have moved to strike it out, or replied specially the *assignment* and *notice*. *Shriner vs. Lamborn, use of Smith*, 170.
4. A court of law will recognize the rights of equitable assignees of *choses in action*, and protect the rights of *cestuis que trust*, but it is done in

## ASSIGNMENT, &amp;c.—Continued.

the exercise of a quasi equitable jurisdiction, where an appeal is made to the justice and discretion of the court, by way of motion, the matter whereof cannot be insisted on as a legal right, or presented in the form of a plea. *Ib.*

5. Payment by the obligor to the obligee, after notice of a *bona fide* assignment of the bond by the latter, will not operate to discharge the debt. *Ib.*
6. A blank endorsement of a single bill by the obligee, may be filled up by the assignee with the full assignment at the trial. *Ib.*
7. Where a policy provides that it shall be void, “in case of its being assigned or transferred or pledged without the previous consent, in writing, of the insurers,” an assignment without such consent confers no right upon the assignee. *Augusta Ins. & Banking Co., vs. Abbott*, 348.

*See ASSIGNMENTS FOR BENEFIT OF CREDITORS.*

## ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

1. A deed of trust, for the benefit of creditors, executed in another State, in conformity with the laws thereof, though not executed, acknowledged or recorded in Maryland, transfers the title to personal property in Maryland so as to defeat an attachment subsequently sued out in this State by creditors of the grantor residing here. *Wilson & Co., vs. Carson & Co., Garnishees of Webb, Marcy & Co.*, 54.

## ATTACHMENT.

1. An order directing consignees “when in funds from sales of various shipments of hog product, to pay” certain named parties “the sum of \$10,000, should the balance coming to us” (the consignors) “amount to that sum,” cannot defeat an attachment laid in the hands of the consignees, by creditors of the consignors, before the former had accepted the order, or in any way assented or agreed to, or recognised the appropriation of the fund to the specified purpose. *Wilson & Co., vs. Carson & Co., Garnishees of Webb, Marcy & Co.*, 54.
2. A deed of trust, for the benefit of creditors, executed in another State, in conformity with the laws thereof, though not executed, acknowledged or recorded in Maryland, transfers the title to personal property in Maryland so as to defeat an attachment subsequently sued out in this State by creditors of the grantor residing here. *Ib.*
3. Heirs at law executed a deed conveying to a trustee all the deceased’s real estate, for sale and distribution, the latter to be made “under the direction of the Circuit Court, and all points of dispute as to advancement, or any other matter that may arise in the premises, to be adjusted by said court.” The trustee gave bond under act of Assembly, sold the property, and then filed a petition stating his proceedings, and asking the court to distribute the proceeds, but the fund was not brought into court. The case was referred to the auditor, who stated a distribution account, by which the sum of \$520.05 was audited to one of the heirs at law, who was a non-resident. This account was ratified nisi, but not finally confirmed. HELD :

## ATTACHMENT—Continued.

- That this fund, in the hands of the trustee, was *not liable to an attachment* at the suit of one of the grantors in the deed, a creditor of the *non-resident*, another grantor, the proceedings being still open, and the fund liable to be brought under the control of the court. *Cockey, Garn. of Leister, vs. Leister*, 124.
4. Funds in the hands of a trustee, under a decree of a court of equity, to sell property, and account with the court for the proceeds are not liable to attachment, but this rule does not apply where the fund has been distributed by the auditor's account finally ratified by an order directing application by the trustee of the funds in his hands *not brought into court*. *Ib.*
  5. By our attachment laws, a garnishee has the right to appear to the action, confess judgment for the amount in his hands, and have his costs allowed out of that sum; and a person cannot be charged as garnishee where his legal relation to the fund is such that he cannot take advantage of this provision of the law. *Ib.*

AUTREFOIS ACQUIT. *See INDICTMENT, 6.*

## BANKS.

1. The board of directors of a bank passed a resolution directing the books for further subscription of stock to the bank to be opened, under the direction of M. and W., "or either of them, and that *five dollars be required on each share, at the time of subscribing.*" N. proposed to subscribe for one hundred shares of stock, provided M. would undertake to raise the money therefor, upon a note for \$1000, he then held against certain parties, and not then due. To this proposition M. agreed, and, in accordance with this agreement, the subscription was made. *HELD:*

That, in taking the subscription in this manner, M. exceeded the authority conferred upon him by the resolution, and there being no proof that his act was ever ratified by the bank, N. is not entitled to a decree, compelling the bank to recognise him as a stockholder. *Farmers and Mechanics Bank of Carroll Co., et al., vs. Nelson*, 35.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where a promissory note is *bona fide sold* by a *public bill and note broker*, by delivery merely, without endorsement, or any *express warranty* or representation, the broker acting as agent, but not disclosing the name of his principal, and no debt being due the purchaser, or created at the time, the latter cannot recover from the broker the money paid for the note, though the names of the maker and one of the endorsers thereon proved to be *forgesies*. *Fisher vs. Reiman, et al.*, 497.
2. In such case, there is no implied warranty of the *genuineness* of the note, but the law respecting the *sale of goods* is applicable. The only implied warranty is, that the broker owns, or is lawfully entitled to dispose of, the paper. *Ib.*
3. As between the original parties to a bill or note, the total or *partial want* or *failure* of consideration, may be relied on as a defence,

## BILLS OF EXCHANGE, &amp;c.—Continued.

and a partial failure avoids the note only *pro tanto*. *Beale vs. Pearre, Adm. of Brown*, 550.

*See* FORMER RECOVERY, 3.

BILL OF RIGHTS. *See* CONSTITUTIONAL LAW, 5.

## BOND.

1. Any individual or body corporate, interested in a bond given by a public officer to the State, for the faithful discharge of official duties, may institute suit thereon in the name of the State, without authority expressly given for that purpose by the State. *State, use of Mayor & C. C. of Balto., vs. Norwood, et al.*, 177.
2. Where, in a suit upon a bond with collateral conditions, the declaration did not assign breaches, and the parties *agreed* that "errors in pleading are waived, and either party may give in evidence such testimony as might be admissible in any form of pleading," there is no necessity to suggest breaches in the pleadings, or upon the roll, before the bond can be admitted in evidence. *Ib.*
3. There is no law requiring the clerk of the Court of Common Pleas to collect or receive for the Mayor and City Council of Baltimore, the five pounds tax on tavern licenses, imposed by the act of 1782, ch. 17, and his official bond, as clerk, is not, therefore, responsible for any sums he may have received on account of such tax. *Ib.*
4. It is the duty of the clerk of the Court of Common Pleas to collect the tax called "*jail fees*," imposed by the act of 1827, ch. 117, sec. 2, and his official bond is responsible for any sums he may have received on account of such tax; and the Mayor and City Council of Baltimore are the proper parties to sue his bond therefor, and not the "visitors of the jail of Baltimore city and county," incorporated by the act of 1831, ch. 58. *Ib.*
5. In a suit upon a bond with collateral conditions, brought in the name of the State, for the use of the equitable plaintiffs, the declaration did not assign breaches, and the parties *agreed* that "errors in pleading on both sides be waived, and that either party may give in evidence any testimony which might have been offered in any state of the pleadings." *HELD:*

That under this agreement breaches need not be suggested in the pleadings, or upon the roll, and the bond sued on must be admitted in evidence, even though the counsel for the equitable plaintiffs, when asked, refused to state what breach of the bond he intended to rely upon. *State, use of Mayor & C. C. of Balto., vs. Norwood, et al.*, 195.

6. The act of 1856, ch. 352, repealing the stamp laws, removes all objection to a bond for want of a stamp, and authorizes the appellate court to reverse the decision of an inferior court, refusing to admit the bond in evidence because not stamped, though the repealing act was not passed until *after* such decision was made. *Ib.*

*See* PRACTICE, 3, 7.

PAYMENT, 1.

COUNTY COMMISSIONERS, 1.

**BROKERS.**

1. Where a promissory note is *bona fide sold* by a *public bill and note broker*, by delivery merely, without endorsement, or any express<sup>s</sup> warranty or representation, the broker acting as agent, but not disclosing the name of his principal, and no debt being due the purchaser, or created at the time, the latter cannot recover from the broker the money paid for the note, though the names of the maker and one of the endorsers thereon proved to be *forgesies*. *Fisher vs. Reiman, et al.*, 497.
2. In such case, there is no implied warranty of the *genuineness* of the note, but the law respecting the *sale of goods* is applicable. The only implied warranty is, that the broker owns, or is lawfully entitled to dispose of, the paper. *Ib.*

**CARRIERS.**

*See COMMON CARRIERS.*

**CESTUI QUE USE.**

*See PRACTICE, 3, 6.*

**CHOSE IN ACTION.**

*See PRACTICE, 5.*

**CLERKS, DUTIES OF, &c.**

1. There is no law requiring the clerk of the Court of Common Pleas to collect or receive for the Mayor and City Council of Baltimore, the five pounds tax on tavern licenses, imposed by the act of 1782, ch. 17, and his official bond, as clerk, is not, therefore, responsible for any sums he may have received on account of such tax. *State, use of Mayor & C. C. of Balto., vs. Norwood, et al.*, 177.
2. It is the duty of the clerk of the Court of Common Pleas to collect the tax called "jail fees," imposed by the act of 1827, ch. 117, sec. 2, and his official bond is responsible for any sums he may have received on account of such tax; and the Mayor and City Council of Baltimore are the proper parties to sue his bond therefor, and not the "visitors of the jail of Baltimore city and county," incorporated by the act of 1831, ch. 58. *Ib.*

**COMITY.**

1. The recognition of the laws of another State in the administration of justice in this, is not a right, *stricti juris*, but depends entirely on *comity*, and in extending it, courts are always careful to see that the statutes or policy of their own States are not infringed, to the injury of their own citizens. *Wilson & Co., vs. Carson & Co., Garnishees of Webb, Maxcy & Co.*, 54.
2. A deed of trust, for the benefit of creditors, executed in another State, in conformity with the laws thereof, though not executed, acknowledged or recorded in Maryland, transfers the *title* to *personal property* in *Maryland* so as to *defeat* an attachment subsequently sued out in this State by creditors of the grantor residing here. *Ib.*

**COMMISSIONERS.**

*See COUNTY COMMISSIONERS.*

## COMMON PLEAS, COURT OF.

*See CLERKS, &c., 1, 2.*

## COMPTROLLER OF THE TREASURY.

*See MANDAMUS, 1 to 3.*

## COMMON CARRIERS.

1. In an action against a *common carrier* it was proved, that while the vessel was on her way down the Patapsco, a *heavy fog* arose, which induced the captain to make for North creek harbor, where there were many vessels safely moored at the time, and in approaching it he was at the helm with a lookout, who, as the vessel neared the entrance, notified him *there was a buoy*, whereupon he bore away, and the vessel struck upon a rock, about thirty yards from the *buoy*, and sunk, thereby damaging the plaintiff's goods. There was no *bill of lading*, and it was also proved that at low water a person standing on the vessel could see the *rock* under the water, which *rippled over it*. HELD:

That this was not an *act of God*, exonerating the carrier; the fact that a *buoy* was placed to indicate the dangerous spot, sufficiently shows that the existence of the rock was *generally known*, and it was the duty of the master to have known and avoided it.

*Fergusson, et al., vs. Brent, 9.*

2. *Private carriers* will be discharged by proof of loss by *inevitable accident*, but nothing will relieve the *common carrier* save an *act of God* or the public enemies, or that which arises from some event expressly provided for in the charter-party. *Ib.*
3. By an "*act of God*" is meant a natural necessity, which could not have been occasioned by the intervention of man, but which proceeds from physical causes alone, such as the violence of the winds or seas, lightning or other natural accident. *Ib.*
4. To relieve the carrier, the *act of God* must be the *direct and immediate cause* of the loss, and without which it would not have occurred; all circumstances produced by human agency must be excluded, so that if divers causes concur in the loss, the *act of God* being one, but not the *proximate cause*, it does not discharge the carrier. *Ib.*
5. The phrase, "*perils of the sea*," includes *something more than* is meant by "*the act of God*," such, for instance, as hidden obstructions in a river, newly placed there, and of a character that no human skill or foresight could have discovered and avoided. *Ib.*

## CONCEALMENT.

*See FACTORS, 3.**INSURANCE, 4 to 15.*

## CONSIDERATION.

*See BILLS OF EXCHANGE, &c., 3.*

## CONSTITUTIONAL LAW,

1. The constitutional provision that, "*In the trial of all criminal cases, the jury shall be judges of law as well as fact*," is merely declaratory.

CONSTITUTIONAL LAW—*Continued.*

- tory*, and has not altered the pre-existing law regulating the powers of the court and jury in criminal cases. *Franklin vs. The State*, 236.
2. The jury, in a criminal case, have no right to judge of the constitutionality of an act of Assembly, and it is proper for the court to prevent counsel for the traverser from arguing that question before the jury. *Ib.*
  3. The provision of the constitution, that the Legislature "shall pass laws necessary to protect the property of the wife from the debts of the husband during her life, and for securing the same to her issue after her death," does not operate to change the rights of property acquired by marriage, so as to deprive the husband of all his marital rights secured to him by the common law. *Schindel vs. Schindel*, 294.
  4. The act of 1853, ch. 245, passed in pursuance of this constitutional requirement, simply carried out one branch of the duty imposed on the Legislature, viz., that of protecting the property of the wife from the debts of the husband. *Ib.*
  5. By the Bill of Rights of this State, every man has the right to "a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty;" unanimity is indispensable to the sufficiency of a verdict. *Ford vs. The State*, 514.

## CONSTRUCTION OF ACTS AND STATUTES.

1. The act of 1729, ch. 8, sec. 5, requiring conveyances of personal property whereof the grantor remains in possession, to be recorded within twenty days in the county where the grantor resides, applies only to deeds made in Maryland, and not to those made in another State. *Wilson & Co. vs. Carson & Co., Garnishees of Webb, Macy & Co.*, 54.
2. By the act of 1839, ch. 234, certain commissioners were authorized to raise, by lottery, for a specified purpose, "the sum of \$30,000, free and clear of all charges and interest whatsoever," and this grant was afterwards consolidated with the State lotteries, by the act of 1842, ch. 72, which directed the State Lottery Commissioners to draw the lottery, and pay over to the commissioners named in the grant, the money authorised to be raised. HELD:  
That the *special commissioners* named in the act of 1839, were the proper parties to ascertain the amount of expenses and interest incurred, and a decree of a court of competent jurisdiction, in a case in which such commissioners were defendants, and the assignees of the grant complainants, ascertaining the sum due on a basis making an allowance for expenses, entered upon the books of the *State Lottery Commissioners*, is binding upon them and their successors, unless obtained by collusion or fraud. *Heckart vs. McPhail, Lottery Commissioner*, 96.
3. The object of the recent acts of Assembly of this State, in reference to the property of married women, was to protect the property

CONSTRUCTION OF ACTS AND STATUTES.—*Continued.*

- of the wife from the debts of the husband, and, during life, secure its enjoyment to the wife; they confer on her no right to separate from her husband without cause, and remove from his custody all her personal property. *Schindel vs. Schindel*, 108.
4. There is no law requiring the clerk of the Court of Common Pleas to collect or receive for the Mayor and City Council of Baltimore, the five pounds tax on tavern licenses, imposed by the act of 1782, ch. 17, and his official bond, as clerk, is not, therefore, responsible for any sums he may have received on account of such tax. *State, use of Mayor & C. C. of Balto. vs. Norwood, et al.*, 177.
5. It is the duty of the clerk of the Court of Common Pleas to collect the tax called "jail fees," imposed by the act of 1827, ch. 117, sec. 2, and his official bond is responsible for any sums he may have received on account of such tax; and the Mayor and City Council of Baltimore are the proper parties to sue his bond therefor, and not the "visitors of the jail of Baltimore city and county," incorporated by the act of 1831, ch. 58. *Ib.*
6. The act of 1856, ch. 352, repealing the stamp laws, removes all objection to a bond for want of a stamp, and authorizes the appellate court to reverse the decision of an inferior court, refusing to admit the bond in evidence because not stamped, though the repealing act was not passed until after such decision was made. *State, use of Mayor & C. C. of Balto., vs. Norwood, el al.*, 195.
7. The stamp laws did not design or profess to confer upon the citizens of the State any private benefits or rights, but operated to impose burdens upon them for State purposes, which the Legislature had full authority to remove at any time, by a repealing act. *Ib.*
8. As a general rule, where the interpretation of a statute is doubtful, in respect to pre-existing contracts, it will be construed as operating prospectively, but when the language of a statute clearly indicates an intention that it shall have a retroactive effect, it must be so applied. *Ib.*
9. The act of 1852, ch. 63, makes the *margin* part of the indictment, and a defect for want of a *venue* in the *body* of an indictment, it being stated in the *margin*, is cured thereby; the design of this act was to relieve prosecutions from some of the technical refinements existing at common law, and should be construed rationally. *Wedges. The State*, 232.
10. Under this act, a judgment cannot be stayed or reversed for any mere imperfections in matters of form, which do not tend to the prejudice of the defendants. *Ib.*
11. At common law a plaintiff cannot recover for injuries to which his own fault or negligence directly contributed, and this principle is not changed by the acts of 1838, ch. 244, and 1846, ch. 346, in relation to the liability of rail road companies in this State, for injuries to cattle and stock on their roads. *Balto. & Ohio Rail Road Co. vs. Lamborne*, 257.
12. The acts of 1838, ch. 244, and 1846, ch. 346, give a right of action

CONSTRUCTION OF ACTS AND STATUTES.—*Continued.*

- to the owner of stock, killed or injured on a railway, *only* when such stock is on the railway *without any fault on the part of the plaintiff.* *Ib.*
13. Under these acts, rail road companies are bound to show that the damage was the result of inevitable accident *only* in cases where the party complaining has not contributed in any manner, by his own negligence or violation of law, to the injury complained of.  
*Ib.*
14. The acts of 1841, ch. 161, 1842, ch. 293, and 1853, ch. 245, relating to the rights of married women, simply protect the property of the wife from the debts of the husband during her life, but in no other way interfere with his marital rights and control over it.  
*Schindel vs. Schindel*, 294.
15. The act of 1825, ch. 117, does not apply to demurrers and motions in arrest of judgment, nor to cases of agreed statement of facts.  
*Keller vs. The State*, 322.
16. Statutes are to be construed in reference to the *principles* of the *common law*; it is not to be presumed, that the legislature intended to make any innovation upon the common law, further than the case absolutely requires, but the law rather infers, that the act did *not* intend to make any alteration other than what is *specified*, and besides *what has been plainly pronounced.* *Hooper vs. Mayor & C. C. of Balto.*, 464.
17. The act of 1834, ch. 89, is a general authority to any corporation not chartered by our State, to make contracts here which are necessary to carry into effect the purposes of the charter, and not prohibited by it, or by some valid law. *Plank Road Co., vs. Young*, 476.
18. In a trial on an indictment for murder, a verdict simply of "guilty," is insufficient, because, by the act of 1809, ch. 138, sec. 3, the jury must ascertain in their verdict the degree of the crime, whether it be murder in the first or second degree. *Ford vs. The State*, 514.
- See COUNTY COMMISSIONERS*, 1.  
*INDICTMENT*, 3, 4, 5.  
*NEGROES AND SLAVES*, 1.  
*ORPHANS COURT*, 7, 8.  
*CONSTITUTIONAL LAW*, 3, 4.  
*TAXES, TAXATION*, 2.
- CONTRACT, CONSTRUCTION OF, &c.**  
*See INSURANCE*, 5, 22.  
*EVIDENCE*, 1.  
*PRINCIPAL AND AGENT*, 1  
*AGREEMENT*.  
*CORPORATIONS*, 1, 2, 4.
- CONVEYANCE,**  
*See DEEDS.*  
*REGISTRATION. REGISTRY LAWS.*

## CORPORATIONS.

1. In a suit in the name of a corporation to recover a subscription to its stock, the plaintiff offered in evidence *letters patent* issued by the Governor of Pennsylvania, creating and erecting certain named subscribers, and also those who shall afterwards subscribe, into a body politic, by the name of "The Wellersburg and West Newton Plank Road Company," with all the privileges incident to a corporation. It was also proved that subscriptions were made by, and certificates of stock issued to, various persons, and the defendant appeared to be a subscriber subsequent to the date of the letters patent, and that the road was constructed, and toll-gates erected, and tolls collected thereon. *HELD:*
  - 1st. That these facts were some evidence that the plaintiff was an incorporated company for the purpose of constructing a *plank road* by means of stock, and that the charter gave authority to the company to take subscriptions for stock after its date.
  - 2nd. The defendant's contract being a subscription for stock of the company, is a contract which was necessary and usual as means for carrying into effect the purposes of such a charter.
  - 3rd. The letters patent having conferred the power of making such a contract in Pennsylvania, the act of 1834, ch. 89, sanctions the like power in Maryland.
  - 4th. The letters patent sufficiently establish the *corporate existence* of the plaintiff, and the matters set forth and recited in them are to be taken as true, until the contrary is proved.
  - 5th. The charter having given authority to take subscriptions, without specifying any *particular manner* in which it shall be done, and the defendant having offered no proof that the *mode adopted* in taking his subscriptions is at variance with any law applicable to the subject, the presumption is, that the contract was valid. *Plank Road Company vs. Young*, 476.
2. When its charter and valid statutory law are silent as to what contracts a corporation may make, as a general rule it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other. *Ib.*
3. The creation of a corporation for a specified purpose, implies a power to use the necessary and usual means to effect that purpose. *Ib.*
4. The act of 1834, ch. 89, is a general authority to any corporation not chartered by our State, to make contracts here which are necessary to carry into effect the purposes of the charter, and not prohibited by it, or by some valid law. *Ib.*

*See BANKS.*

## COUNTY COMMISSIONERS.

1. The duty imposed upon the county commissioners by the act of 1831, ch. 281, sec. 8, of taking bond with sufficient security from

**COUNTY COMMISSIONERS—Continued.**

the county collectors, for the collection of the colonization tax imposed by that act, is a *judicial* and not a *ministerial* duty, requiring the exercise of *judgment* and *discretion*, and a mere *error of judgment* in the discharge of this duty, gives the State no right of action against such commissioners. *State vs. Dunnington, et al.*, 340.

*See PRACTICE, 1.*

**CRIMES AND PUNISHMENTS.**

*See INDICTMENT.*

*VERDICT.*

**DAMAGES, MEASURE OF, &c.**

1. In an action of trespass *de bonis asportatis*, payment of the judgment against the defendant, confers on him the ownership of the property taken, and therefore the measure of damages is its value at the time of the asportation. *Schindel vs. Schindel*, 102.
2. In such an action the jury may consider any facts and circumstances accompanying and giving color to the trespass, for the purpose of increasing the damages; the motives which induce a tortious act, are always matters for the consideration of the jury. *Ib.*

**DEEDS.**

1. A deed of trust, for the benefit of creditors, executed in another State, in conformity with the laws thereof, though not executed, acknowledged or recorded in Maryland, transfers the *title* to personal property in Maryland so as to defeat an attachment subsequently sued out in this State by creditors of the grantor residing here. *Wilson & Co., vs. Carson & Co., Garmishees of Webb, Maxcy & Co.*, 54.
2. The act of 1729, ch. 8, sec. 5, requiring conveyances of personal property, whereof the grantor remains in possession, to be recorded within twenty days in the county where the grantor resides, applies only to deeds made in Maryland, and not to those made in another State. *Ib.*
3. The testimony of two witnesses, (lawyers,) that they are of opinion a certain deed is, according to the laws of Kentucky, where it was executed, legal and sufficient to convey the property to the grantees, and that they know of no *statute* of that State affecting this *opinion*, is sufficient proof of the foreign law, and this being the only testimony on this point in the case, and the question being whether the deed should be admitted in evidence, the proof is for the court. *Ib.*

**DEMURRER.**

1. Objections to an indictment, that the act charged against the traverser is no offence within the true meaning of the law under which the indictment was framed, and that the law itself is unconstitutional, are subjects of demurrer, and, since the act of 1852, ch. 63, can be raised by a demurrer to the indictment, and in no other way. *Cowman vs. The State*, 250.
2. Alleged defects in an indictment as to *venue*, (the margin, however,  
74 v. 12.

**DEMURRER—Continued.**

showing that the court had jurisdiction,) and because it failed to designate the prisoner as a *free negro*, and stated his given name incorrectly, and concluded by charging the murder to have been committed by the *murdered man*, instead of the *prisoner*, are all subjects of demurrer, and, since the act of 1852, ch. 63, a valid judgment upon a verdict of guilty on such an indictment, the prisoner *not demurring*, could have been entered, and such judgment could not have been stayed, arrested, or reversed. *State vs. Reed*, 263.

3. Agreed statements of facts, serve the same purposes and are governed by the same principles, and, by the practice in this State, have almost entirely taken the place of, special verdicts; like such verdicts their effect is to place the facts on the record as part thereof, and the court decides thereon as on demurrer. *Keller vs. The State*, 322.
4. The act of 1825, ch. 117, does not apply to demurrs and motions in arrest of judgment, nor to cases of agreed statements of facts.

*Ib.*

**DEVIATION.**

*See INSURANCE, 16 to 19.*

**DISCLAIMER.**

*See TRUST, TRUSTEE AND CESTUI QUE TRUST, 4.*

**DISTRESS FOR RENT.**

1. A *piano-forte* belonging to a stranger, and hired to a *music teacher* boarding at a public hotel, and found in the hotel, and not being in use as an instrument of trade or profession, and there not being a sufficiency of other goods on the premises, is liable to be distrained for rent due by the hotel keeper. *Trieber vs. Knabe & Betts*, 491.
2. The instruments of a man's trade or profession are not *absolutely* exempt from liability for rent, but only in case of their being in actual use, or when there is a sufficiency of other goods on the premises to meet in full the distress. *Ib.*

**DOCKET ENTRIES.**

*See VERDICT, 6, 7.*

**EQUITABLE PLAINTIFFS.**

*See PRACTICE, 3, 6.*

**ESTOPPEL.**

1. A verdict and judgment upon the merits, in a former suit, is, in a subsequent suit between the same parties, where the cause of action, damages or demand is identically the same, conclusive against the plaintiff's right to recover, whether *pleaded* in bar, or *given in evidence* under the general issue, and such prior verdict and judgment need not be pleaded by way of estoppel. *Beall vs. Peirre, Adm'r of Brown*, 550.
2. The decision of a court upon a claim in a former action, is as

**ESTOPPEL—Continued.**

effectual a bar to a recovery in another suit, upon the same cause of action, as that of *a jury*; and the fact that the court's decision was *wrong*, does not give the injured party the right to bring another suit upon the same claim, for he might have *appealed*, and had the error corrected. *Ib.*

3. In a suit upon a promissory note, the maker, as a defence, relied upon and gave evidence of a *breach of warranty* in relation to certain barrels of beef, for which the note was given. The court, by an *instruction given to the jury*, decided *against* this defence, and the *verdict* and judgment were in favor of the plaintiff, for the full amount of the note. *HELD:*

That this decision by the court, though *erroneous*, upon the defendant's *claim*, was a bar to a subsequent action by him against the plaintiff, upon the same *breach of warranty*; for having failed to *correct* the error by *appeal*, he is not entitled to relief in a new suit. *Ib.*

**EVIDENCE.**

1. Two parties *jointly liable* on a contract were sued, and one of them was taken and the other returned *non est*: *HELD*, that the *latter* was a *competent witness* for the *plaintiff*, to prove the terms of the contract. *Baugh & Orendorff vs. Culler*, 6.
2. The testimony of two witnesses, (lawyers,) that they are of opinion a certain deed is, according to the laws of Kentucky, where it was executed, legal and sufficient to convey the property to the grantee, and that they know of no statute of that State affecting this opinion, is sufficient proof of the foreign law, and this being the only testimony on this point in the case, and the question being whether the deed should be admitted in evidence, the proof is for the court. *Wilson & Co., vs. Carson & Co., Garnishees of Webb, Maxcy & Co.*, 54.
3. Where a trust is created by a will in a party who is also executor, the probate of the will, and taking out letters testamentary thereon, by such party, are *sufficient evidence* of the *acceptance* of the trust. *Hanson & Wife, et al., vs. Worthington, et al.*, 418.

*See PRACTICE, 4.*

**FORMER RECOVERY**, 1.

**NEGROES AND SLAVES**, 5.

**JURY, JURORS**, 3.

**CORPORATIONS**, 1.

**EXCEPTIONS TO ANSWERS.**

*See PRACTICE IN EQUITY*, 11, 12.

**EXECUTORS AND ADMINISTRATORS.**

1. Where a party is *sole* executor, and also a trustee, the fund will, by operation of law, be considered in his hands as *trustee*, after the time limited for the settlement of the estate, and where there are two executors, and one dies, the same principle applies to the survivor. *Hanson & Wife, et al., vs. Worthington, et al.*, 418.

EXECUTORS AND ADMINISTRATORS—*Continued.*

2. Where a trust is created by a will in a party who is also executor, the probate of the will, and taking out letters testamentary thereon, by such party, are sufficient evidence of the acceptance of the trust. *Ib.*
3. Proceedings of an executor in the orphans court, in reference to the distribution of the estate, made *ex parte*, there being no appointment of a meeting of claimants, as provided by the testamentary act, and no order of the court directing the distribution, are not conclusive upon any party affected thereby. *Ib.*

*See LEGACY, LEGATEE,* 1.

ORPHANS COURT, 6, 7, 8.

## FACTORS.

1. It is the duty of a factor to keep books, in which shall be correctly entered the transactions on account of his principal, and the latter is entitled to a correct copy of the entries, including all memoranda connected therewith. *Keighler, et al., vs. Savage Manf. Co.* 363.
2. Where a factor has rendered his account-sales regularly, and the same were settled with *full knowledge* of all their items, and the *names of purchasers* were not then required, it is unreasonable, at any considerable distance of time thereafter, to subject the *factor* to a demand for such names, if his conduct has been honest and faithful, and free from fraud or deceit. *Ib.*
3. Good faith is the paramount and vital principle of the law governing the relation of principal and factor; the latter cannot *purchase* for himself the property of his principal consigned to him for sale to others, except with the knowledge, consent and approbation of the principal, upon a free, full and frank disclosure of every circumstance connected with the transaction, and a total absence of all fraud and concealment. *Ib.*

## FAILURE OF CONSIDERATION.

*See BILLS OF EXCHANGE, &c., 3.*

## FOREIGN LAWS.

1. The testimony of two witnesses, (lawyers,) that they are of opinion a certain deed is, according to the laws of Kentucky, where it was executed, legal and sufficient to convey the property to the grantee, and that they know of no statute of that State affecting this opinion, is sufficient proof of the foreign law, and this being the only testimony on this point in the case, and the question being whether the deed should be admitted in evidence, the proof is for the court. *Wilson & Co., vs. Carson & Co., Garnishees of Webb, Maxcy, & Co.*, 54.
2. The recognition of the laws of another State in the administration of justice in this, is not a right, *stricti juris*, but depends entirely on comity, and in extending it, courts are always careful to see that the statutes or policy of their own States are not infringed, to the injury of their own citizens. *Ib.*

**FORGERY.**

*See Bills of Exchange, &c., 1, 2.*

**FORMER RECOVERY.**

1. A verdict and judgment upon the merits, in a former suit, is, in a subsequent suit between the same parties, where the cause of action, damages or demand is identically the same, conclusive against the plaintiff's right to recover, whether *pledged* in bar, or *given in evidence* under the general issue, and such prior verdict and judgment need not be pleaded by way of estoppel. *Beall vs. Pearre, Adm'r of Brown*, 550.
2. The decision of a court upon a claim in a former action, is as effectual a bar to a recovery in another suit, upon the same cause of action, as that of a jury; and the fact that the court's decision was *wrong*, does not give the injured party the right to bring another suit upon the same claim, for he might have *appealed*, and had the error corrected. *Ib.*
3. In a suit upon a promissory note, the maker, as a defence, relied upon and gave evidence of a *breach of warranty* in relation to certain barrels of beef, for which the note was given. The court, by an instruction *given to the jury*, decided *against* this defence, and the *verdict* and judgment were in favor of the plaintiff, for the full amount of the note. *HELD:*

That this decision by the court, though *erroneous*, upon the defendant's claim, was a bar to a subsequent action by him against the plaintiff, upon the same *breach of warranty*; for having failed to *correct* the error by *appeal*, he is not entitled to relief in a new suit. *Ib.*

**FRAUD.**

*See Factors, 2, 3.*

**FREEDOM, PETITIONS FOR.**

*See Negroes and Slaves, 2, 4.*

**FREE NEGROES.**

*See Negroes and Slaves, 1.*

**GUARDIAN AND WARD.**

1. A *release* executed by a female infant to her guardian, after attaining the age of eighteen, is, if *bona fide* made, a good acquittance to the guardian, but cannot discharge from liability a third party holding funds as her trustee, which were never paid or transferred to the guardian. *Hanson & Wife, et al., vs. Worthington, et al.*, 418.

**HUSBAND AND WIFE.**

1. A wife living in a state of separation from her husband, cannot be regarded as his *agent*, and has no authority to bind him by any *contract*, except for *necessaries*: she cannot *authorize another* to enter his house, and take therefrom the household furniture. *Schindel vs. Schindel*, 168.

## HUSBAND AND WIFE—Continued.

2. The object of the recent acts of Assembly of this State, in reference to the property of married women, was to *protect* the property of the wife from the debts of the husband, and, during life, secure its enjoyment to the wife; they confer on her no right to separate from her husband without cause, and remove from his custody all her personal property. *Ib.*
3. By an *ante-nuptial* agreement, a wife was empowered to dispose of certain real and personal property, by will, and to hold and receive certain funds for her sole and separate use. *HELD*, that the orphans court were right in admitting her will to probate, as valid to pass real and personal estate, its form and attestation being sufficient, but were not required to decide what extent of property would pass under the will. *Michael vs. Baker, Exc'x of Michael*, 158.
4. The orphans courts are courts of limited jurisdiction: they may take probate of wills disposing of real and personal estate, and where the will of a *married woman* is propounded for probate, the probate does not decide upon the *right of disposal*, but merely upon the *factum* of the instrument. *Ib.*
5. Where the will of a *married woman* having, by an *ante-nuptial* agreement, power to dispose of property by will, is offered for probate, the orphans court will not look nicely into the power of the wife; the question whether the will is a sufficient execution of the power belongs to the courts of law and equity, and not to the orphans court. *Ib.*
6. Where a wife under an *ante-nuptial* agreement, is entitled to receive and hold certain funds to her sole and separate use free from the marital rights of her husband, such funds will pass by her will, though the power of disposing of them may not be expressly conferred upon her by the agreement. *Ib.*
7. An *ante-nuptial* agreement, giving to the wife power to dispose of certain real and personal property by will, is not a testamentary paper, forms no part of her will and should not be admitted to probate. *Ib.*
8. The acts of 1841, ch. 161, 1842, ch. 293, and 1853, ch. 245, relating to the rights of married women, simply protect the property of the wife from the debts of the husband during her life, but in no other way interferes with his marital rights and control over it. *Schindel vs. Schindel*, 294.
9. The provision of the constitution, that the Legislature “shall pass laws necessary to protect the property of the wife from the debts of the husband during her life, and for securing the same to her issue after her death,” does not operate to change the rights of property acquired by marriage, so as to deprive the husband of all his marital rights secured to him by the common law. *Ib.*
10. The act of 1853, ch. 245, passed in pursuance of this constitutional requirement, simply carried out one branch of the duty imposed on the Legislature, viz., that of protecting the property of the wife from the *debts* of the husband. *Ib.*

**HUSBAND AND WIFE—Continued.**

11. A wife living separate from her husband, without his consent and without *justifiable cause*, cannot be allowed *maintenance* out of her *legal estate* which she inherited and was seized and possessed of at the time of the marriage; in such a case a court of equity has no power or jurisdiction to disturb the husband in the exercise of his legal rights over her property, or decree any equitable settlement for the wife out of it. *Ib.*
12. The causes which will justify a wife in separating from her husband, must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be performed.  
*Ib.*

**INDEMNITY.**

*See SURETY AND SURETIES.*

**INDICTMENT.**

1. The act of 1852, ch. 63, makes the *margin* part of the indictment, and a defect for want of a *venue* in the *body* of an indictment, it being stated in the *margin*, is cured thereby; the design of this act was to relieve prosecutions from some of the technical refinements existing at common law, and should be construed rationally. *Wedge vs. The State*, 232.
2. Under this act, a judgment cannot be stayed or reversed for any mere imperfections in matters of form, which do not tend to the prejudice of the defendants. *Ib.*
3. A statute, in its *enacting part*, prohibited any person from selling spirituous liquors to any slave, “*unless upon the written order of his or her master, mistress, or owner.*” An indictment, under this act, charged a party with selling liquor to a slave, “*who then and there did not have a written order of his master, mistress, or owner, authorizing the said sale.*” **HELD:**  
That this indictment was defective in not sufficiently negativing the *existence* of the written order; it is not enough to negative the possession of the order by the slave, but it must appear affirmatively on the face of the indictment that the act of the traverser was not done *upon* such order. *Franklin vs. The State*, 236.
4. Objections to an indictment, that the act charged against the traverser is no offence within the true meaning of the law under which the indictment was framed, and that the law itself is unconstitutional, are *subjects of demurrer*, and, since the act of 1852, ch. 63, can be raised by a demurser to the indictment, and in no other way. *Cowman vs. The State*, 250.
5. Alleged defects in an indictment as to *venue*, (the *margin*, however, showing that the court had jurisdiction,) and because it failed to designate the prisoner as a *free negro*, and stated his given name incorrectly, and concluded by charging the murder to have been committed by the *murdered man*, instead of the *prisoner*, are all *subjects of demurrer*, and, since the act of 1852, ch. 63, a *valid*

INDICTMENT—*Continued.*

- judgment upon a verdict of *guilty* on such an indictment, the prisoner *not demurring*, could have been entered, and such judgment could not have been *stayed, arrested or reversed*. *State vs. Reed*, 263.
6. A trial upon such an indictment is not, therefore, a *mistrial*, so as to enable the State to proceed anew upon another indictment, and the jury having rendered a verdict of "*not guilty*, by reason of the insufficiency of the indictment," the plea of *autrefois acquit* is a bar to a *second* indictment for the *same crime*. *Ib.*
  7. A party cannot be convicted after the law under which he may be prosecuted has been repealed, though the offence may have been committed before the repeal, and the same principle applies where the law is repealed or expires pending an appeal or writ of error from the judgment of an inferior court. *Keller vs. The State*, 322.
  8. The judgment in a criminal case cannot be considered as final and conclusive to every intent, notwithstanding an appeal or writ of error; execution of the sentence is not stayed if the State chooses to proceed on the judgment, but if the judgment is reversed, such reversal operates to discharge the prisoner from punishment. *Ib.*
  9. Where there has been, in the eye of the law, no valid and sufficient *verdict*, there must be a *new trial*; in such a case there is a *mistrial*, and the indictment being good, the prisoner may be tried anew on the same indictment. *Ford vs. The State*, 514.

*See* VERDICT.

## INJUNCTION.

1. A Court of Equity will, upon a bill filed by the mortgagee, either *before* or *after* default made by the mortgagor, interfere by *injunction* to prevent waste or destruction, by the mortgagor in possession, of the mortgaged property, whether real or *personal*. *Parsons vs. Hughes*, 1.
2. Negroes manumitted by a will have the right to file a bill in equity, asking that court to marshal assets, in order to procure proper evidence to enable them to prosecute their petition for freedom, and to decide whether the real estate is charged with the payment of debts in favor of the bequest of freedom, and on such a bill are entitled to an *injunction*, restraining the prosecution of their petition for freedom, and the executor from paying pecuniary legacies, and judgment creditors from selling them under execution, until these questions are settled. *Negroes Charles, et al., vs. Sheriff, Exc'r of Waring*, 274.
3. It is no objection to such a bill for an injunction that it is not verified by *affidavit*, the negroes being incapable of making such an affidavit, and the production of an authenticated copy of the will being sufficient; it is not indispensable in *all cases*, that a bill for an injunction should be sworn to; all that is required is, that the confidence of the court should be obtained, and this may be had on documentary evidence as well as on affidavit. *Ib.*

INJUNCTION—*Continued.*

4. Nor is it any objection to such a bill that no injunction bond was tendered, for no bond could be tendered until the court fixed the amount of the penalty, and if the court had granted the injunction, it would have done so, on condition that a prescribed bond should be first filed. *Ib.*
5. Granting an injunction is a matter resting in the sound discretion of a court of equity, and such a power should be exercised with extreme caution, and to warrant its action, strong *prima facie* evidence of the facts on which the complainant's equity rests, must be presented to the court. *Nusbaum, et al., vs. Stein, et al.*, 315.
6. Where the claim is on a written instrument in the complainant's possession, it should be exhibited with the bill, or a satisfactory reason assigned for its non-production, and a bill stating the complainant's claim to be founded on promissory notes, none of which are exhibited, and no reason or excuse given therefor, will not warrant the granting of an injunction, though the bill be sworn to. *Ib.*
7. Where the only claim on which the complainant can ask for an injunction, is a small sum on open account, of which no account is produced verified by affidavit, and the allegations of the bill show the defendant to be possessed of a large sum over and above the mortgages and conveyances attacked by the bill, a preliminary injunction should not be granted to affect the property embraced in such conveyances. *Ib.*
8. An appeal will not lie from an order granting or refusing to dissolve an injunction, until *answer* filed, and an *insufficient answer* is *no answer* for the purpose of an appeal, but it is for *this court*, and not the court below, to judge of the *sufficiency* of the answer, it being for the *appellate court* alone to determine when an appeal will lie. *Keighler, et al., vs. Savage Manuf. Co.*, 383.
9. According to the chancery practice of this State, the motion to dissolve an injunction, and exceptions to the answer, are heard and decided at the same time. *Ib.*
10. If a judgment is confessed with the agreement that it is not an ascertainment of so much *actual* indebtedness, but only a *security* for so much as thereafter might be ascertained to be due, equity will prevent any use of the judgment for a different purpose, but the proof of such an agreement must be abundantly full and explicit, so as to leave no doubt on the mind of the court. *Ib.*

## INSURANCE.

1. A policy of insurance is not a negotiable security, and the general clause, "for whom it concerns," only avails for the person for whose benefit it was intended when obtained, by the party obtaining it, and whether it was so intended for one claiming the benefit of it, is a question of *fact* for the jury. *Augusta Ins. & Banking Co., vs. Abbott.* 348.
2. Where a policy provides that it shall be void, "in case of its being assigned or transferred or pledged without the previous consent, in

## INSURANCE—Continued.

- writing, of the insurers,”* an assignment without such consent confers no right upon the assignee. *Ib.*
3. So far as *good faith* in obtaining the insurance is concerned, a policy issued “*for whom it concerns,*” stands on the same ground as any other; for every such policy *supposes an agency*, and one who claims the benefit of it, is *bound by the acts and representations* of the parties or agents connected with the business of *procuring it*, although obtained without his knowledge. *Ib.*
  4. If any *misrepresentation* or *concealment* of facts *material to the risk* be shown on the part of the agents or parties obtaining such a policy, it is void, no matter how innocent the party for whom it was *intended* may be, and no matter whether such misrepresentation or concealment be fraudulent, or the result of negligence or inadvertence on the part of such agents or parties. *Ib.*
  5. The utmost good faith and fair dealing are of the very essence of the contract of insurance, and every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium, ought to be communicated to him. *Ib.*
  6. A statement made to the insurers, that the vessel “is about ready to sail,” or “she will sail soon,” is not a *promissory representation* as to the time of sailing, which binds the assured and the breach of which will vitiate the policy. *Ib.*
  7. In answer to the question, “what is the condition of the vessel as to seaworthiness?” a representation that she is a “*good old vessel,*” imports no more than that she is *seaworthy*. *Ib.*
  8. Where a representation is made merely *on information*, the assured is not answerable for the truth of the *facts* stated, but only for the truth with which he has *stated the information received*. *Ib.*
  9. In a policy on a cargo of *lumber*, the implied warranty is, that the vessel is seaworthy to transport *such a cargo*, and a statement to the insurers, that on a previous voyage she had carried a cargo of *coal* without insurance, did not enlarge that warranty so as to require the insured to prove she was seaworthy to carry *coal*. *Ib.*
  10. The difference between a *representation* and a *warranty* is, that while the latter must be *literally* fulfilled, it is sufficient if the former be *substantially* complied with. *Ib.*
  11. Seaworthiness is an *implied warranty* in every contract of insurance, and the assured need not, in the *first instance*, disclose any fact however material to the risk, which tends to show the ship was unseaworthy when she sailed. *Ib.*
  12. But when *inquiries* are made as to matters embraced in an *implied warranty*, such inquiries may render it necessary for the assured or his agent to disclose facts respecting which he might otherwise be silent. *Ib.*
  13. An inquiry, “what is the condition of the vessel ‘as to seaworthiness?’” is general and indefinite, not pointing to any particular fact, and imports no more than an inquiry as to whether she was seaworthy. *Ib.*

**INSURANCE—Continued.**

14. Such an inquiry imposed no obligation upon the assured, to disclose facts tending to show the insufficiency of the vessel to carry a cargo of coal, or that she had been *discredited* by the marine insurance reports of the port where she was lying, or that ineffectual attempts had been made to get her insured there. *Ib.*
15. It is well settled that the assured is not bound to disclose the fact, that the risk has been declined by others or the estimate they put upon it, unless information on the subject be particularly called for. *Ib.*
16. Under a policy on a cargo of lumber “*at* and from Baltimore to Boston,” the risk commences from the time the lumber is laden on board the vessel, and a *deviation* thereafter will avoid the policy, whether it occurs *before* or *after* the vessel actually leaves the port of departure. *Ib.*
17. A deviation avoids the policy because it *varies* the risk, and *delay* in *commencing* or prosecuting the voyage is as much a *deviation* as a divergence from its prescribed course, and will discharge the underwriters if *unreasonable* or *inexcusable*, and this rule applies as well to a policy *on cargo* as *on the vessel*. *Ib.*
18. Not to deviate is as much an implied warranty in every insurance on a voyage, as the seaworthiness of the vessel, and each of these warranties is implied whether the policy be on the *ship* or on the *cargo*. *Ib.*
19. A delay, from the 19th of November to the 22nd of December, in *commencing* the voyage, is unreasonable, amounts to a deviation, and will discharge the policy on the cargo unless it proceeds from causes which justify or excuse it. *Ib.*
20. What the actual causes of delay are, is a question of *fact* for the jury; the legal sufficiency of such causes, to justify or excuse it, must be decided by the court. *Ib.*
21. Delay resulting from the difficulty in obtaining a crew is excusable, but if occasioned by proceedings instituted in the District Court of the United States, in admiralty, for the recovery of debts due for repairs to the vessel, by which she was seized, detained and sold, it is not excusable. *Ib.*
22. The underwriter does not run the risk of obstructions occasioned by the debts, insufficient acquittance, or neglect to pay debts of the assured, and this rule applies whether the policy be on the *vessel* or on the *cargo*; detention for such cause is not covered by the terms, “*restraints and detainments of all kings, princes or people.*”  
*Ib.*
23. Where a delay in commencing the voyage is occasioned by debts of the vessel previously existing, and contracted without reference to the particular voyage, and the owner of the *cargo* insured is on the spot, the master cannot sell or hypothecate the *same* to pay such debts, except with the consent and authority of such owner, whom he must consult. *Ib.*

## INTEREST.

*See TRUST, TRUSTEE, CESTUI QUE TRUST, 2.*

## JUDGMENT.

1. As a general rule, the judgment of a court of record is, during the entire term at which it is rendered, under the control of the court, and liable to be stricken out, altered or amended. *Robinson vs. Commissioners of Harford County*, 132.
2. Under the act of 1852, ch. 63, a judgment cannot be stayed or reversed, for any mere imperfections in matters of form, which do not tend to the prejudice of the defendants. *Wedge vs. The State*, 232.
3. The judgment in a criminal case cannot be considered as final and conclusive to every intent, notwithstanding an appeal or writ of error; execution of the sentence is not stayed if the State chooses to proceed on the judgment, but if the judgment is reversed, such reversal operates to discharge the prisoner from punishment. *Keller vs. The State*, 322.
4. A judgment is the highest exercise of judicial power; *prima facie* it imports verity, and, as to the parties to it, is conclusive, unless mistake or fraud be shown, and the *onus* is on those who impeach it; it should be interfered with or questioned only with great delicacy and circumspection. *Keighler, et al., vs. Savage Manf. Co.*, 383.
5. If a judgment is confessed with the agreement that it is not an ascertainment of so much actual indebtedness, but only a security for so much as thereafter might be ascertained to be due, equity will prevent any use of the judgment for a different purpose, but the proof of such an agreement must be abundantly full and explicit, so as to leave no doubt on the mind of the court. *Ib.*

*See APPEAL AND ERROR, 11.*

## INDICTMENT, 5.

## JURISDICTION.

1. An administrator *pendente lite*, is responsible to the orphans court so long as he holds the letters, and that court has adequate powers to protect the interests of those concerned in the faithful performance of his duties, and a court of equity has no right to interfere with him, or with the funds in his hands belonging to the estate. *Lee & Wife, vs. Price, et al.*, 253.

*See HUSBAND AND WIFE, 11.*

## JURY AND JURORS.

1. The jury, in a criminal case, have no right to judge of the *constitutionality* of an act of Assembly, and it is proper for the court to prevent counsel for the traverser from arguing that question before the jury. *Franklin vs. The State*, 236.
2. The constitutional provision that, "In the trial of all criminal cases, the jury shall be judges of law as well as fact," is merely declaratory, and has not altered the pre-existing law regulating the powers of the court and jury in criminal cases. *Ib.*

JURY AND JURORS—*Continued.*

3. Jurors cannot testify in relation to the motives upon which they joined in the verdict; if, through mistake or partiality, they deliver an improper verdict, the court may, *before it is recorded*, desire them to reconsider it, but the jury cannot be allowed to make any alteration *after* the verdict is recorded. *Ford vs. The State*, 514.
4. After the foreman, *speaking for the whole panel*, finds a proper verdict, which is *recorded*, and the whole panel is called on to *hearken to it* as the court hath recorded it, and they have so *hearkened to it*, no objection being made by any juror, or the counsel for the State or prisoner, such verdict is the verdict of the whole panel, and it is then *too late* for any of the jury to alter or amend it, and also *too late* to *poll* the panel. *Ib.*
5. The object of a *poll* is to call on *each* juror to answer for himself, and in his *own language*, and where, in a trial for murder, the verdict was simply “*guilty*,” and on being polled, the *foreman alone* answered “*guilty of murder in the first degree*,” and *each* of the *others* answered “*guilty*,” *without specifying the degree in words*, such verdict is *insufficient*, because at *no time* did *all* the jury find the prisoner “*guilty of murder in the first degree*.” *Ib.*
6. By the Bill of Rights of this State, *every man* has the *right* to “*a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty*;” *unanimity* is *indispensable* to the sufficiency of a *verdict*. *Ib.*

## LACHES AND LAPSE OF TIME.

1. What lapse of time and laches are sufficient to bar the right of parties to recover on a claim *purely equitable*, depends upon the particular facts and circumstances of each case. *Hanson & Wife, et al., vs. Worthington, et al.*, 418.

*See TRUST, TRUSTEE, CESTUI QUE TRUST, 2.*

## LANDLORD AND TENANT.

1. A *piano-forte* belonging to a stranger, and hired to a *music teacher* boarding at a public hotel, and found in the hotel, and not being in use as an instrument of trade or profession, and there not being a sufficiency of other goods on the premises, is liable to be dispossessed for rent due by the hotel keeper. *Trieber vs. Knabe & Betts*, 491.
2. The instruments of a man’s trade or profession are not *absolutely* exempt from liability for rent, but only in case of their being in actual use, or when there is a sufficiency of other goods on the premises to meet in full the distress. *Ib.*

## LAW AND FACT.

1. A policy of insurance is not a negotiable security, and the general clause, “*for whom it concerns*,” only avails for the person for whose benefit it was intended when obtained, by the party obtaining it, and whether it was so intended for one claiming the benefit of it, is a question of fact for the jury. *Augusta Ins. & Banking Co., vs. Abbott*, 348.
2. What the actual causes of delay are, is a question of *fact* for the

**LAW AND FACT—Continued.**

jury; the legal sufficiency of such causes, to justify or excuse it must be decided by the court. *Ib.*

3. Whilst the appellate court cannot find the facts, yet the judgment of the inferior court on those facts is a matter of law, and where the facts are found by the court or jury below, it is the proper and legitimate province of the appellate court to see that the inferior court has pronounced correctly the law as applicable to the facts.

*Ford vs. The State*, 514.

**LEGACY, LEGATEE.**

1. A testator bequeathed \$10,000 to a trustee, who was also one of his executors, to be put at interest, or invested in stocks, and to be held in trust, to apply the income to the support of the testator's wife during her life, and, after her death, he gave and bequeathed said sum and the securities in which it may have been invested, to the children of his daughter Mary. He further directed that the power of thus putting at interest, and investing, and of selling and reinvesting, as often as the trustee deemed expedient, should be a continuing power during the requisite continuance of the trust. The wife renounced the provisions of this will. **HELD:**

1st. That by such renunciation the rights and interests of the legatees in remainder were not affected; the estate in remainder was vested in such legatees, and the renunciation only struck from the will the bequest to the wife.

2nd. The executor and trustee having, under a mistake as to the effect of this renunciation, settled up the estate, and wrongfully paid this legacy to the residuary legatees, both he and they are responsible to the *cestuis que trust* therefor, the former primarily, and the latter ultimately.

3rd. Limitation is no bar to this claim, and, under the circumstances of the case, there has been no such lapse of time, or laches and delay in making the claim, nor acquiescence and concurrence in the settlement of the estate and distribution of the fund, as will bar the complainants of their equitable relief.

4th. The parties who wrongfully received the legacy, being bound to refund the same, having taken it *subject to the trust*, and they, as well as the trustee, being alive and in court, upon a bill filed by the *cestuis que trust* against all of them, the decree, while providing for payment to the complainants, will also give the trustee relief over against his co-defendants.

5th. The complainants are entitled to *interest* on the principal sum due them for this legacy, from the time the same was wrongfully paid to the residuary legatees, but several payments having been made through a period of years, it should be counted, under the circumstances of the case, only from the date of the *last payment*. *Hanson & Wife, et al., vs. Worthington, et al.*, 418.

**LIEN.**

*See ASSIGNMENT, ASSIGNOR, ASSIGNEE, 2.*

**LIMITATIONS.**

*See TRUST, TRUSTEE, CESTUI QUE TRUST, 2.*

**LOTTERIES AND LOTTERY COMMISSIONER.**

1. By the act of 1839, ch. 234, certain commissioners were authorized to raise, by *lottery*, for a specified purpose, "the sum of \$30,000, free and clear of all charges and interest whatsoever," and this grant was afterwards consolidated with the State lotteries, by the act of 1842, ch. 74, which directed the State Lottery Commissioners to draw the lottery, and pay over to the commissioners named in the grant, the money authorised to be raised. **HELD:**

That the *special commissioners* named in the act of 1839, were the proper parties to ascertain the amount of *expenses* and interest incurred, and a *decree* of a court of competent jurisdiction, in a case in which such *commissioners* were defendants, and the *assignees* of the grant complainants, *ascertaining the sum due on a basis making an allowance for expenses*, entered upon the books of the *State Lottery Commissioners*, is binding upon them and their *successors*, unless obtained by collusion or fraud.

*Heckart vs. McPhail, Lottery Commissioner, 96.*

**MAINTENANCE.**

*See HUSBAND AND WIFE, 11.*

**MANDAMUS.**

1. The Comptroller of the Treasury, being clothed by the constitution with the exclusive power of *adjusting* and *settling* public accounts, is not a mere ministerial officer, and cannot, therefore, be compelled, by *mandamus*, to perform any act, in the discharge of his duties, which involves the exercise of *judgment* and *discretion*.  
*Green vs. Purnell, Comptroller of the Treasury, 329,*
2. A *mandamus* cannot issue in any case where discretion and judgment are to be exercised by the officer; it can be granted only where the act required to be done is merely ministerial, and the party is without any other adequate remedy. *Ib.*
3. The question, who is entitled to an appropriation in the general appropriation act, of a certain sum for "the rent of house for fire-engine," under a certain state of facts, and under certain acts and a resolution of the Legislature, is a question for the Comptroller to determine, in the exercise of his *judgment* and *discretion*. *Ib.*

**MANUMISSION.**

*See NEGROES AND SLAVES, 2. 4.*

**MARSHALLING OF ASSETTS.**

*See INJUNCTION, 2.*

**MAYOR AND CITY COUNCIL OF BALTIMORE,**

*See CLERKS, &c., 1, 2.*

**MISREPRESENTATION.**

*See INSURANCE, 4 to 15.*

**MISTAKE.**

*See PRACTICE IN EQUITY, 1.*

**MISTRIAL.**

*See INDICTMENT, 6, 9.*

**MORTGAGE, MORTGAGOR, MORTGAGEE.**

1. A Court of Equity will, upon a bill filed by the mortgagee, either before or after default made by the mortgagor, interfere by injunction to prevent waste or destruction, by the mortgagor in possession, of the mortgaged property, whether real or personal. *Parsons vs. Hughes*, 1.
2. A mortgage was executed "to indemnify, secure and save harmless" M., as surety on a specified note given by the mortgagor to S., "from all losses by reason of his liability as security aforesaid." This note, after maturity, was placed in bank for collection, and the maker being unable to pay the whole, the bank agreed to, and did, discount a new note of the maker for the balance, with M. and another, as endorsers. At the time M. put his name to this new note, it was understood by him and the maker, that the money raised on it should be applied to pay the balance on the old note due S., which was done, and the old note paid. HELD:

- 1st. That the liability of M., on the new note, was a continuation of the same liability as that secured by the mortgage, and this mortgage is a subsisting security therefor, and is entitled to a preference over subsequent mortgages of the same property.
- 2nd. The mortgagor being insolvent, and the mortgaged property having been sold, under a decree in equity, and the proceeds brought into court, M. has the right to have them applied to this debt, though he has not paid the note to the bank. *Markell vs. Eichelberger, Trustee, &c.*, 78.

**MULTIPLICITY OF SUITS.**

1. A trustee ought not to be subjected to the consequences of a multiplicity of suits, and may avail himself of objection, without pleading specially, where the subject matter of the defence is presented by the plaintiff himself. *Cockey, Garnishee of Leicester, vs. Leicester*, 124.

**MURDER.**

*See VERDICT.*

**NEGROES AND SLAVES.**

1. A testator, by apt words, devises a tract of land in fee, then "leaves" all his personal estate, except negroes, to be disposed of by his executor, and the residue of his real estate "to be rented out yearly," directs his house to be repaired by his executor "from the income of his real and personal estate," manumits his negroes, Beckey and Elizabeth Ellen, and directs others to be hired out for a term of years, and then set free, and then "leaves Beckey and her children a reasonable support, to be given by his executor from the income of

## NEGROES AND SLAVES—Continued.

his real and personal estate, during her life, and at her death" he gives "to Elizabeth Ellen *all the income* of his whole estate, *real and personal, to her and her heirs forever, to be paid over yearly by his executor; but if there should be any among them not able to take care of themselves, they are to have a support.*" He then appoints his executor, and gives him a legacy of \$100 "and *ten per cent. on all money received by him and his heirs forever.*" HELD:

That under this will, the *legal title* to the residue of the testator's real estate passed to the *executor*, who took therein a *trust by implication* for the benefit of the manumitted negroes, and such a devise does not contravene the *policy* of the laws of this State, in regard to free negroes. *Brown, et al.'s Lessee vs. Brown*, 87.

2. Negroes manumitted by a will have the right to file a bill in equity, asking that court to marshal assets, in order to procure proper evidence to enable them to prosecute their petition for freedom, and to decide whether the real estate is charged with the payment of debts in favor of the bequest of freedom, and on such a bill are entitled to an *injunction*, restraining the prosecution of their petition for freedom, and the executor from paying pecuniary legacies, and judgment creditors from selling them under execution, until these questions are settled. *Negroes Charles, et al. vs. Sheriff, Exc'r of Waring*, 274.
3. It is no objection to such a bill for an injunction that it is not verified by *affidavit*, the negroes being incapable of making such an affidavit, and the production of an authenticated copy of the will being sufficient. *Ib.*
4. The orphans court has no right, on the application of the executor, to pass an order for the sale of negroes manumitted by the will to pay debts, *pending* a bill filed in *equity* by such negroes, asking for the marshalling of assets, and the adjustment of the proportions in which the several legatees were bound to contribute to the payment of the debts, in order to enable the complainants to prosecute their petition for freedom. *Sheriff, Exc'r of Waring, vs. Negroes Charles, et al.*, 280.
5. There are but two cases in which, in a court of law in this State, a *nigro* suffers a disqualification because of the *presumption* arising from his color, the one where he is offered as a witness in a case where a white person is interested, the other where the question is freedom *vel non*. *Hughes vs. Jackson*, 450.
6. A free negro suing in our courts is sufficiently described by the word "*nigro*," for it notifies the adversary party of the fact of color, and affords him an opportunity of pleading the disability of slavery, if it exists. *Ib.*

*See INDICTMENT*, 3, 5.

*PRACTICE*, 1.

*APPEAL AND ERROR*, 1, 2.

76 v. 12.

**NEW TRIAL.***See INDICTMENT, 9.***NOTICE.***See ASSIGNMENT, ASSIGNOR, ASSIGNEES, 1.***PRACTICE, 3.****PAYMENT, 1.****ORPHANS COURT, 9.****RECEIVERS, 1.****OBLIGOR, OBLIGEE.***See PAYMENT, 1.***OFFICER.**

1. Any individual or body corporate, interested in a bond given by a public officer to the State, for the faithful discharge of official duties, may institute suit thereon in the name of the State, without authority expressly given for that purpose by the State. *State, use of Mayor & C. C. of Balto., vs. Norwood, et al.*, 177.
2. There is no law requiring the clerk of the Court of Common Pleas to collect or receive for the Mayor and City Council of Baltimore, the five pounds tax on tavern licenses, imposed by the act of 1782, ch. 17, and his official bond, as clerk, is not, therefore, responsible for any sums he may have received on account of such tax. *Ib.*
3. It is the duty of the clerk of the Court of Common Pleas to collect the tax called "jail fees," imposed by the act of 1827, ch. 117, sec. 2, and his official bond is responsible for any sums he may have received on account of such tax; and the Mayor and City Council of Baltimore are the proper parties to sue his bond therefor, and not the "visitors of the jail of Baltimore city and county," incorporated by the act of 1831, ch. 58. *Ib.*
4. The Comptroller of the Treasury, being clothed by the constitution with the exclusive power of *adjusting* and *settling* public accounts, is not a mere ministerial officer, and cannot, therefore, be compelled, by *mandamus*, to perform any act, in the discharge of his duties, which involves the exercise of *judgment* and *discretion*. *Green vs. Purnell, Comptroller of the Treasury*, 329.
5. A *mandamus* cannot issue in any case where discretion and judgment are to be exercised by the officer; it can be granted only where the act required to be done is merely ministerial, and the party is without any other adequate remedy. *Ib.*
6. The question, who is entitled to an appropriation in the general appropriation act, of a certain sum for "the rent of house for fire-engine," under a certain state of facts, and under certain acts and a resolution of the Legislature, is a question for the Comptroller to determine, in the exercise of his *judgment* and *discretion*. *Ib.*

**ORPHANS COURT.**

1. By an *ante-nuptial* agreement, a wife was empowered to dispose of certain real and personal property, by will, and to hold and receive certain funds for her sole and separate use. **HELD**, that the orphan

**ORPHANS COURT—Continued.**

court were right in admitting her will to probate, as valid to pass real and personal estate, its form and attestation being sufficient, but were not required to decide what extent of property would pass under the will. *Michael vs. Baker, Exc'r of Michael*, 158.

2. The orphans courts are courts of limited jurisdiction: they may take probate of wills disposing of real and personal estate, and where the will of a *married woman* is propounded for probate, the probate does not decide upon the *right of disposal*, but merely upon the *factum* of the instrument. *Ib.*
3. Where the will of a *married woman* having, by an *ante-nuptial agreement*, power to dispose of property by will, is offered for probate, the orphans court will not look nicely into the power of the wife; the question whether the will is a sufficient execution of the power belongs to the courts of law and equity, and not to the orphans court. *Ib.*
4. An *ante-nuptial agreement*, giving to the wife power to dispose of certain real and personal property by will, is not a testamentary paper, forms no part of her will and should not be admitted to probate. *Ib.*
5. An administrator *pendente lite*, is responsible to the orphans court so long as he holds the letters, and that court has adequate powers to protect the interests of those concerned in the faithful performance of his duties, and a court of equity has no right to interfere with him, or with the funds in his hands belonging to the estate. *Lee & Wife, vs. Price, et al.*, 253.
6. The orphans court has no right, on the application of the executor, to pass an order for the sale of negroes manumitted by the will to pay debts, pending a bill filed in equity by such negroes, asking for the marshalling of assets, and the adjustment of the proportions in which the several legatees were bound to contribute to the payment of the debts, in order to enable the complainants to prosecute their petition for freedom. *Sheriff, Exc'r of Waring, vs. Negroes Charles, et al.*, 280.
7. An appeal from the orphans court must be taken within thirty days after the decree, order, decision or judgment appealed from was passed, as required by the act of 1818, ch. 204, otherwise the appeal will be dismissed. *Porter Exc'r of Earlougher, vs. Timanus*, 283.
8. Under the act of 1831, ch. 315, the orphans court is clothed with a discretion to pass an order requiring an executor to bring money in his hands into court, and, upon failure to comply, to revoke his letters, and when that court has exercised such discretion, its decision is final, and no appeal lies therefrom. *Ib.*
9. Notice of such order ought, in all cases, to be given to the party upon whom it is designed to operate, and he should be allowed his day in court to comply therewith. *Ib.*

*See EXECUTORS AND ADMINISTRATORS.*

**PARTIES TO SUITS.**

1. A person having no interest in the question litigated between

**PARTIES TO SUITS—Continued.**

parties, to a suit in equity, and against whom *no relief* is prayed by the bill, is not a *necessary party* to the suit; whatever rights he may have, he can assert in a proceeding to be instituted by himself. *Wright vs. Santa Clara Mining Association, et al.*, 443.

**PAYMENT.**

1. Payment by the obligor to the obligee, after notice of a *bona fide* assignment of the bond by the latter, will not operate to discharge the debt. *Shriner vs. Lamborn, use of Smith*, 170.

**PLEAS AND PLEADING.**

1. Where, in a suit upon a bond with collateral conditions, the declaration did not assign breaches, and the parties *agreed* that "errors in pleading are waived, and either party may give in evidence such testimony as might be admissible in any form of pleading," there is no necessity to suggest breaches in the pleadings, or upon the roll, before the bond can be admitted in evidence. *State, use of Mayor & C. C. of Balto. vs. Norwood, et al.*, 177.
2. In a suit upon a bond with collateral conditions, brought in the name of the State, for the use of the equitable plaintiffs, the declaration did not assign breaches, and the parties *agreed* that "errors in pleading on both sides be waived, and that either party may give in evidence any testimony which might have been offered in any state of the pleadings." **HELD:**

That under this agreement breaches need not be suggested in the pleadings, or upon the roll, and the bond sued on must be admitted in evidence, even though the counsel for the equitable plaintiffs, when asked, refused to state what breach of the bond he intended to rely upon. *State, use of Mayor & C. C. of Balto., vs. Norwood, et al.*, 195.

3. A free negro suing in our courts is sufficiently described by the word "*negro*," for it notifies the adversary party of the fact of color, and affords him an opportunity of pleading the disability of slavery, if it exists. *Hughes vs. Jackson*, 450.
4. A verdict and judgment upon the merits, in a former suit, is, in a subsequent suit between the same parties, where the cause of action, damages or demand is identically the same, conclusive against the plaintiff's right to recover, whether *pleaded* in bar, or *given in evidence* under the general issue, and such prior verdict and judgment need not be pleaded by way of estoppel. *Beall vs. Pearre, Adm'r of Brown*, 550.
5. In a suit upon a promissory note, the maker, as a defence, relied upon and gave evidence of a *breach of warranty* in relation to certain barrels of beef, for which the note was given. The court, by an *instruction given to the jury*, decided *against* this defence, and the *verdict* and judgment were in favor of the plaintiff, for the full amount of the note. **HELD:**

That this decision by the court, though *erroneous*, upon the defendant's *claim*, was a bar to a subsequent action by him

**PLEAS AND PLEADING—Continued.**

against the plaintiff, upon the same *breach of warranty*; for having failed to *correct* the error by *appeal*, he is not entitled to relief in a new suit. *Ib.*

*See SCIRE FACIAS*, 1.

**PRACTICE**, 3, 4, 5.

**MULTIPlicity OF SUITS**, 1.

**INDICTMENT**, 6.

**POWERS, EXECUTION OF.**

*See WILL AND TESTAMENT*, 4.

**PRACTICE.**

1. A valuation of a convicted slave was made by the judge on the *same day* of the sentence, and *nine days* thereafter, and during the *same term*, the county commissioners filed a petition asking the judge to correct the valuation, upon the ground that it was erroneously made too high, for reasons stated, and the court passed an order setting the petition down for hearing, with liberty to the owners and the commissioners to take testimony. Under this order affidavits were taken and filed by both parties, and, upon them, the *successor* of the judge, who tried the case, two years after the sentence, revised the valuation, and fixed it at a *less sum*. **HELD:**

That the county commissioners had the right to file the petition, and there was *no error* in the proceeding in reference to the *second valuation*, there being nothing to show that the delay was occasioned more by the fault of the commissioners than of the owners, and the succeeding judge having the same authority over the case as his *predecessor*. *Robinson vs. Commissioners of Harford County*, 132.

2. As a general rule, the judgment of a court of record is, during the entire term at which it is rendered, under the control of the court, and liable to be stricken out, altered or amended. *Ib.*
3. An action was brought on a single bill in the name of the obligee, as *legal plaintiff*, for the *use* of his *assignee*, as the equitable plaintiff. The declaration was in the usual form of *debt*, the obligee being named therein as plaintiff. The obligor, the defendant, pleaded *payment* “to the said plaintiff,” and on this plea issue was joined. **HELD:** That the defendant could offer, in support of this issue, a receipt showing that he *had paid* the bond to the *obligee*, though such payment was made *after*, and with full notice of, the assignment; the *cestui que use*, instead of taking issue on the plea, should have moved to strike it out, or replied specially the assignment and notice. *Shriner vs. Lamborn, use of Smith*, 170.
4. Where a party takes issue, in fact, upon an allegation not constituting a legal bar to his action, he cannot successfully ask the court to rule out testimony, if it be in proof of such allegation. *Ib.*
5. A court of law will recognize the rights of equitable assignees of *chooses in action*, and protect the rights of *cestuis que trust*, but it is done in

## PRACTICE—Continued.

- the exercise of a quasi equitable jurisdiction, where an appeal is made to the justice and discretion of the court, by way of motion, the matter whereof cannot be insisted on as a legal right, or presented in the form of a plea. *Ib.*
6. The rights of the equitable plaintiff, or person beneficially entitled, will be recognized and protected, but they must be brought to the consideration of the court in some regular form, so that they may be put in issue, and examined and passed upon by the court or the jury. *Ib.*
  7. A blank endorsement of a single bill by the obligee, may be filled up by the assignee with the full assignment at the trial. *Ib.*
  8. Any individual or body corporate, interested in a bond given by a public officer to the State, for the faithful discharge of official duties, may institute suit thereon in the name of the State, without authority expressly given for that purpose by the State. *State, use of Mayor & C. C. of Balto., vs. Norwood, et al.*, 177.
  9. Where, in a suit upon a bond with collateral conditions, the declaration did not assign breaches, and the parties agreed that "errors in pleading are waived, and either party may give in evidence such testimony as might be admissible in any form of pleading," there is no necessity to suggest breaches in the pleadings, or upon the roll, before the bond can be admitted in evidence. *Ib.*
  10. In a suit upon a bond with collateral conditions, brought in the name of the State, for the use of the equitable plaintiffs, the declaration did not assign breaches, and the parties agreed that "errors in pleading on both sides be waived, and that either party may give in evidence any testimony which might have been offered in any state of the pleadings. HELD:
- That under this agreement breaches need not be suggested in the pleadings, or upon the roll, and the bond sued on must be admitted in evidence, even though the counsel for the equitable plaintiffs, when asked, refused to state what breach of the bond he intended to rely upon. *State, use of Mayor & City Council of Baltimore vs. Norwood, et al.*, 195.
11. The jury, in a criminal case, have no right to judge of the constitutionality of an act of Assembly, and it is proper for the court to prevent counsel for the traverser from arguing that question before the jury. *Franklin vs. The State*, 236.
  12. Agreed statements of facts, serve the same purposes and are governed by the same principles, and, by the practice in this State, have almost entirely taken the place of, special verdicts; like such verdicts their effect is to place the facts on the record as part thereof, and the court decides thereon as on demurrer. *Keller vs. The State*, 322.
  13. A case was continued under an agreement that it should be struck off at the next term, if not tried, and judgment for the defendant for costs. Subsequently to the next term, the plaintiff had leave

**PRACTICE—Continued.**

to amend, and the defendant *pledged* to the amended *nor*, and the case was carried on to judgment, without notice taken of the agreement. HELD:

That the proceedings subsequent to the agreement constituted a *waiver*, with the concurrence of the court, of all advantage conferred upon the defendant by the agreement. *Hughes vs. Jackson*, 450.

14. Where the court below refused to consider reasons for a new trial because not filed within the time required by the *rules* of court, such decision cannot be reviewed on appeal. *Ib.*
15. Where a court has established rules for its government, and that of suitors, there exists no discretion in the court to dispense at pleasure with such rules, or to innovate on established practice. *Ib.*
16. A free negro suing in our courts is sufficiently described by the word “*negro*,” for it notifies the adversary party of the fact of color, and affords him an opportunity of pleading the disability of slavery, if it exists. *Ib.*

*See APPEAL AND ERROR.*

*PRACTICE AND EQUITY.*

*PRACTICE IN THE COURT OF APPEALS.*

*SCIRE FACIAS*, 1.

*EVIDENCE*, 2.

*FORMER RECOVERY.*

*TRESPASS DE BONIS ASPORTATIS.*

*PRAYERS AND INSTRUCTIONS TO THE JURY.*

*VERDICT.*

*INDICTMENT.*

*RAILROADS, &c., 1 to 4.*

*AGREED STATEMENTS OF FACTS.*

**PRACTICE IN EQUITY.**

1. A creditor's bill was filed against a devisee for the sale of the real estate of the testator, to pay debts. The defendant, having been duly summoned, failed to appear, and an interlocutory decree was obtained against him, proof taken, and final decree for a sale duly passed. During the same term the defendant filed a petition asking that this decree might be opened, and his answer let in, alleging that there was some defect in the service of the summons, and the decree passed in consequence of some mistake and surprise, and that the claim of the complainant had been fully paid and settled by the testator, in his life time. The deputy sheriff made affidavit that he read the summons to the defendant, distinctly informed him of its contents and object, and that defendant replied thereto, “I will attend to it,” or “will see about it.” But it was proved that the bill was filed upon the same cause of action (a single bill) on which the complainant, six years before the testator's death, had instituted a suit at law, which suit was entered

**PRACTICE IN EQUITY—Continued.**

on the docket "settled," and the cause of action, some months after the testator's death, was, at the instance of the complainant, withdrawn and delivered to him by the clerk, under an order of the court, but why or for what purpose, does not appear. *HELP:*

That in view of the affidavit of the deputy sheriff, the decree ought not to be opened upon the allegations of defect in the service of the summons, and of mistake or surprise, but in view of the entry "settled," and the circumstances under which the cause of action was withdrawn, the defendant is entitled to relief: such facts tending strongly to show there was misapprehension on his part, which prevented his appearance and answer, and that such failure was not the result of wilful negligence, or intentional disobedience to the command of the summons. *Tabler vs. Castle*, 144.

2. According to the chancery practice of this State, a decree is not considered as enrolled until the end of the term in which it has been passed. *Ib.*
3. Negroes manumitted by a will have the right to file a bill in equity, asking that court to marshal assets, in order to procure proper evidence to enable them to prosecute their petition for freedom, and to decide whether the real estate is charged with the payment of debts in favor of the bequest of freedom, and on such a bill are entitled to an injunction, restraining the prosecution of their petition for freedom, and the executor from paying pecuniary legacies, and judgment creditors from selling them under execution, until these questions are settled. *Negroes Charles, et al., vs. Sheriff, Ex'cr of Waring*, 274.
4. It is no objection to such a bill for an injunction that it is not verified by affidavit, the negroes being incapable of making such an affidavit, and the production of an authenticated copy of the will being sufficient; it is not indispensable in all cases, that a bill for an injunction should be sworn to; all that is required is, that the confidence of the court should be obtained, and this may be had on documentary evidence as well as on affidavit. *Ib.*
5. Nor is it any objection to such a bill that no injunction bond was tendered, for no bond could be tendered until the court fixed the amount of the penalty, and if the court had granted the injunction, it would have done so, on condition that a prescribed bond should be first filed. *Ib.*
6. Granting an injunction is a matter resting in the sound discretion of a court of equity, and such a power should be exercised with extreme caution, and to warrant its action, strong *prima facie* evidence of the facts on which the complainant's equity rests, must be presented to the court. *Nusbaum, et al., vs. Stein, et al.*, 315.
7. Where the claim is on a written instrument in the complainant's possession, it should be exhibited with the bill, or a satisfactory rea-

## PRACTICE IN EQUITY—Continued.

- son assigned for its non-production, and a bill stating the complainant's claim to be founded on promissory notes, none of which are exhibited, and no reason or excuse given therefor, will not warrant the granting of an injunction, though the bill be sworn to. *Ib.*
8. Where the only claim on which the complainant can ask for an injunction, is a small sum on open account, of which no account is produced verified by affidavit, and the allegations of the bill show the defendant to be possessed of a large sum over and above the mortgages and conveyances attacked by the bill, a preliminary injunction should not be granted to affect the property embraced in such conveyances. *Ib.*
9. A receiver ought not to be appointed without previous notice of the application given to the defendant, unless the necessity be of the most stringent character. *Ib.*
10. A party submitting to answer must answer fully and frankly, and he who evidently and purposely holds back something, cannot complain if he find himself regarded with suspicion and distrust, and be refused that to which he may in truth be entitled, and under other appearances might have obtained. *Keighler, et al., vs. Savage Manf. Co.*, 383.
11. According to the chancery practice of this State, the motion to dissolve an injunction, and exceptions to the answer, are heard and decided at the same time. *Ib.*
12. Where an answer refers to a paper as showing the dates and amounts of receipts from certain collaterals in the defendants' hands, to a correct and detailed statement of which the complainant was entitled, and such paper does not appear in the record, an exception for insufficiency in this particular must be sustained. *Ib.*
13. If a judgment is confessed with the agreement that it is not an ascertainment of so much *actual* indebtedness, but only a security for so much as thereafter might be ascertained to be due, equity will prevent any use of the judgment for a different purpose, but the proof of such an agreement must be abundantly full and explicit, so as to leave no doubt on the mind of the court. *Ib.*
14. An appeal will not lie from an order granting or refusing to dissolve an injunction, until answer filed, and an insufficient answer is no answer for the purpose of an appeal, but it is for *this court*, and not the court below, to judge of the sufficiency of the answer, it being for the *appellate court* alone to determine when an appeal will lie. *Ib.*
15. Where a party equally entitled with the complainants to a legacy claimed by the bill, is made a defendant, and by his answer disclaims any claim for such legacy, the bill as to him should be dismissed. *Hanson & Wife, et al., vs. Worthington, et al.*, 418.
16. Where two of several defendants, in their answers, claim rights and relief as against their co-defendants, in case the complainants should

PRACTICE IN EQUITY—*Continued.*

- be entitled to relief, and the decree of the court below dismissed the bill with costs, they not being aggrieved by such decree, cannot *appeal* therefrom; an appeal on their part is not necessary in order to save their rights. *Ib.*
17. The parties who wrongfully received a legacy being bound to refund the same, having taken it subject to a trust, and they as well as the trustee being alive and in court, upon a bill filed by the *cestui que trusts* against all of them, the decree while providing for payment to the complainants, will also give the trustee relief over against his co-defendants. *Ib.*
  18. A person having no interest in the question litigated between the parties, to a suit in equity, and against whom no relief is prayed by the bill, is not a necessary party to the suit; whatever rights he may have, he can assert in a proceeding to be instituted by himself. *Wright vs. Santa Clara Mining Association*, 443.

*See SCIRE FACIAS*, 1.

## INJUNCTION.

## MORTGAGE, MORTGAGOR, MORTGAGEE, 2.

## ATTACHMENT, 3 to 5.

## MULTIPLEXITY OF SUITS.

## PRACTICE IN THE COURT OF APPEALS.

1. The fact that a rule of court purports to be set out in one of the reasons filed with a motion to dismiss a petition, is not sufficient proof to the appellate court of the existence of such a rule. *Robinson vs. Commissioners of Harford County*, 132.
2. The act of 1856, ch. 352, repealing the stamp laws, removes all objection to a bond for want of a stamp, and authorizes the appellate court to reverse the decision of an inferior court, refusing to admit the bond in evidence because not stamped, though the repealing act was not passed until after such decision was made. *State, use of Mayor & C. C. of Balto. vs. Norwood, et al.*, 195.
3. A party was indicted and convicted, and *appealed* from the judgment. After the case was argued in the Court of Appeals, the Legislature passed a law *repealing* the act under which the indictment was framed, but this law was not brought to the notice of the court until the judgment had been *affirmed*. Afterwards, but at the same term of the court, a motion was made to strike out the affirmation and enter a judgment of reversal. *HELD:*

That the question presented by this motion, must be disposed of as if the repealing act had been passed before the judgment was affirmed, and the motion must be granted. *Keller vs. The State*, 322.

4. An appellate court in disposing of an appeal or writ of error, must decide according to existing laws at the time of the final judgment. *Ib.*
5. In criminal cases where fines or penalties are imposed, an appeal will lie upon questions of law apparent on the record, and such

**PRACTICE IN THE COURT OF APPEALS—Continued.**

- questions sufficiently appear on the record, where the defence is presented in the court below by an agreed statement of facts. *Ib.*
6. Such agreed statement of facts, serve the same purposes and are governed by the same principles, and, by the practice in this State, have almost entirely taken the place of, special verdicts; like such verdicts their effect is to place the facts on the record as part thereof, and the court decides thereon as on demurrer. *Ib.*
  7. The act of 1825, ch. 117, does not apply to demurrs and motions in arrest of judgment, nor to cases of agreed statement of facts.  
*Ib.*
  8. Where two of several defendants, in their answers, claim rights and relief as against their co-defendants, in case the complainants should be entitled to relief, and the decree of the court below dismissed the bill with costs, they not being aggrieved by such decree, cannot appeal therefrom; an appeal on their part is not necessary in order to save their rights. *Hanson & Wise, et al., vs. Worthington, et al.*, 418.
  9. Where the court below refused to consider reasons for a new trial because not filed within the time required by the rules of court, such decision cannot be reviewed on appeal. *Hughes vs. Jackson*, 450.
  10. Whatever assumes the solemnity of a judgment of a court of record, is part and parcel of the record, and examinable in the appellate tribunal on a writ of error. *Ford vs. The State*, 514.
  11. Whilst the appellate court cannot find the facts, yet the judgment of the inferior court on those facts is a matter of law, and where the facts are found by the court or jury below, it is the proper and legitimate province of the appellate court to see that the inferior court has pronounced correctly the law as applicable to the facts.  
*Ib.*
  12. Where the judge of an inferior court, in his decision, embodied in the transcript of the record sent to the appellate court, sets forth the facts occurring upon the rendition of a verdict in a trial for murder, and these facts show that all the jury did not at any time find the prisoner "guilty of murder in the first degree," the judgment of the court, upon such verdict, sentencing the prisoner to be hanged, may be reviewed by the appellate court on writ of error, notwithstanding the docket entries of the court below, both original and as extended in the transcript, show a verdict in due form, of "guilty of murder in the first degree." *Ib.*
  13. In such a case, the appellate court may look to the misprision of the clerk, who is but the hand of the court, and whose duty it is, in contemplation of law, to record nothing but the proceedings of the court. *Ib.*

**PRAYERS AND INSTRUCTIONS TO THE JURY.**

1. A prayer, after stating certain facts hypothetically as the basis of the legal propositions, contains the clause, "and if the jury shall

PRAYERS AND INSTRUCTIONS TO THE JURY—*Continued.*

- find all other facts assumed by this prayer," HELD, that this clause is objectionable as tending to mislead the jury, and vitiates a prayer otherwise good. *Augusta Ins. & Banking Co. vs. Abbott*, 348.
2. It is no objection to a prayer that it asks less from the court than the party offering it was, upon the facts of the case embodied in it, and left to be found by the jury, entitled to. *Trieber vs. Knabe & Betts*, 491.
  3. An instruction to the jury, that if they believe "that the beef, in the declaration mentioned, was deposited with the plaintiff, to be sold on commission, then their verdict must be for the defendant," is erroneous, because nothing is said of the terms on which the jury might have believed the deposit was made. *Beall vs. Pearre, Adm'r of Brown*, 550.

## PRESUMPTIONS OF LAW AND OF FACT.

1. Where a party is sole executor, and also a trustee, the fund will, by operation of law, be considered in his hands as trustee, after the time limited for the settlement of the estate, and where there are two executors, and one dies, the same principle applies to the survivor. *Hanson & Wife, et al., vs. Worthington, et al.*, 418.
2. There are but two cases in which, in a court of law in this State, a negro suffers a disqualification because of the presumption arising from his color, the one where he is offered as a witness in a case where a white person is interested, the other where the question is freedom *rel non*. *Hughes vs. Jackson*, 450.

*See CORPORATIONS*, 1, 3.

## PRINCIPAL AND AGENT.

1. The board of directors of a bank passed a resolution directing the books for further subscription of stock to the bank to be opened, under the direction of M. and W., "or either of them, and that five dollars be required on each share, at the time of subscribing." N. proposed to subscribe for one hundred shares of stock, provided M. would undertake to raise the money therefor, upon a note for \$1000, he then held against certain parties, and not then due. To this proposition M. agreed, and, in accordance with this agreement, the subscription was made. HELD :

That, in taking the subscription in this manner, M. exceeded the authority conferred upon him by the resolution, and there being no proof that his act was ever ratified by the bank, N. is not entitled to a decree, compelling the bank to recognise him as a stockholder. *Farmers and Mechanics Bank of Carroll Co., et al., vs. Nelson*, 35.

*See FACTORS.*

## PROMISSORY NOTES.

*See BILLS OF EXCHANGE, &c.*

## RAIL ROADS AND RAILROAD COMPANIES.

1. At common law a plaintiff cannot recover for injuries to which his

**RAIL ROADS AND RAILROAD COMPANIES—Continued.**

- own fault or negligence directly contributed, and this principle is not changed by the acts of 1838, ch. 244, and 1846, ch. 346, in relation to the liability of rail road companies in this State, for injuries to cattle and stock on their roads. *Balto. & Ohio Rail Road Co. vs. Lamborn*, 257.
2. Under these acts, rail road companies are bound to show that the damage was the result of inevitable accident only in cases where the party complaining has not contributed in any manner, by his own negligence or violation of law, to the injury complained of.  
*Ib.*

3. The owner of cattle is bound to keep them in an enclosure or in custody at *his peril*, for every entry by them on another's possession is a *trespass*, and this principle applies as well to the intrusion of cattle and horses upon the land over which a rail road company is entitled to its franchise as to the property of a private owner. *Ib.*
4. The acts of 1838, ch. 244, and 1846, ch. 346, give a right of action to the owner of stock, killed or injured on a railway, only when such stock is on the railway without any fault on the part of the plaintiff. *Ib.*

**RECEIVERS.**

1. A receiver ought not to be appointed without previous notice of the application given to the defendant, unless the necessity be of the most stringent character. *Nusbaum, et al., vs. Stein, et al.*, 315.

**RECORD.**

*See APPEAL AND ERROR, 11, 12, 13.*

**REGISTRATION AND REGISTRY LAWS.**

1. The act of 1729, ch. 8, sec. 5, requiring conveyances of personal property whereof the grantor remains in possession, to be recorded within twenty days in the county where the grantor resides, applies only to deeds made in *Maryland*, and not to those made in another State. *Wilson & Co. vs. Carson & Co., Garnishees of Webb, Maxcy & Co.*, 54.

**RELEASE.**

1. A release discharging an *executor* from the sums due to the parties releasing, as *residuary legatees*, cannot operate to discharge him from his liability as trustee for a *specific legacy* bequeathed to him in trust for the benefit of the same parties executing the release. *Hanson & Wife, et al., vs. Worthington, et al.*, 418.
2. A *release* executed by a female infant to her guardian, after attaining the age of eighteen, is, if *bona fide* made, a good acquittance to the guardian, but cannot discharge from liability a third party holding funds as her trustee, which were never paid or transferred to the guardian. *Ib.*

**RENT.**

1. A *piano-forte* belonging to a stranger, and hired to a *music teacher*

**RENT—Continued.**

boarding at a public hotel, and found in the hotel, and not being in use as an instrument of trade or profession, and there not being a sufficiency of other goods on the premises, is liable to be distrained for rent due by the hotel keeper. *Trieber vs. Knabe & Betts*, 491.

2. The instruments of a man's trade or profession are not *absolutely* exempt from liability for rent, but only in case of their being in actual use, or when there is a sufficiency of other goods on the premises to meet in full the distress. *Ib.*

**RENUNCIATION.**

*See TRUST, TRUSTEE, CESTUI QUE TRUST, 2.*

**SALES.**

1. Where a promissory note is *bona fide sold* by a *public bill and note broker*, by delivery merely, without endorsement, or any *express* warranty or representation, the broker acting as agent, but not disclosing the name of his principal, and no debt being due the purchaser, or created at the time, the latter cannot recover from the broker the money paid for the note, though the names of the maker and one of the endorsers thereon proved to be *forgesies*. *Fisher vs. Reiman, et al.*, 497.
2. In such case, there is no implied warranty of the *genuineness* of the note, but the law respecting the *sale of goods* is applicable. The only implied warranty is, that the broker owns, or is lawfully entitled to dispose of, the paper. *Ib.*

**SCIRE FACIAS.**

1. An act of Assembly was passed, authorizing a county court to grant an appeal to the plaintiff, in a case in which the judgment was in favor of the defendant, and to incorporate into the record the same exceptions which had been taken in another and similar case, tried in the same court, an appeal in which was then pending. The exceptions were accordingly signed, and the case prepared for the Court of Appeals, but before the record was sent up, the other case was reversed and sent back under *procedendo*, and tried again and new exceptions taken. An agreement was then made by the parties to reinstate the first case, in order that these new questions might be raised in this case also, and it was "agreed, that if the proceedings of the county court in signing the exceptions, should be deemed by the Court of Appeals, void, by reason of the *unconstitutionality* of the act of Assembly by which they were authorized to be signed, then the appeal in said case shall be dismissed, otherwise it shall be heard and determined on the questions of law raised in the other case." The case was reinstated and a verdict and judgment rendered for the plaintiff, and the defendant appealed, and the record with the above agreement sent to the Court of Appeals, which decided the act unconstitutional and dismissed the appeal. The plaintiff then attempted to enforce the last judgment in his favor by *scire facias*, insisting that the dismissal of the

**SCIRE FACIAS—Continued.**

*appeal* left that judgment in full force. This attempt the defendant resisted, both by plea to the *sci. fa.*, and by motion to strike out the judgment, insisting, that by the above agreement the judgment was to be *void*, if the act of Assembly was declared unconstitutional. *HELD:*

That this defence was not the subject matter of a plea *at law* to the *scire facias*, but that the defendant is entitled to relief against the judgment in *equity*, the design of the *agreement* being, to prevent the plaintiff from proceeding on his judgment, if the act of Assembly was declared unconstitutional.

*Miller's Heirs and Terre-tenants vs. State, use of Flery*, 207.

**SEAWORTHINESS.**

*See INSURANCE*, 7, 11.

**SHIPS AND SHIPPING.**

1. A ship registered at the custom-house in, and *sailing out* of the port of Baltimore, owned by a *bona fide* and *actual* resident of Baltimore county, having his place of business, as a merchant, in the city, is not liable to pay taxes to the city for municipal purposes. *Hooper vs. Mayor & C. C. of Balto.*, 464.
2. A vessel thus situated is not, within the meaning of the tax law of 1852, ch. 337, "*permanently located elsewhere within the State*" than at the *domicil* of the owner, but is subject to the general rule of the common law that personal property has *no locality* other than that of the *domicil* of the owner. *Ib.*
3. By the laws of congress, the registration district of which Baltimore is the port of entry, is not confined to the limits of Baltimore city, and the fact that a vessel is *registered* at the custom-house in Baltimore, gives to the *city* no more right to tax her than to any other part of the district. *Ib.*

*See COMMON CARRIERS*, 1.

**INSURANCE.****SPECIAL VERDICTS.**

*See AGREED STATEMENTS OF FACTS*, 2.

**SPECIFIC PERFORMANCE.**

*See SUBSCRIPTIONS FOR STOCK*, 1.

**STAMPS AND STAMP LAWS.**

1. The act of 1856, ch. 352, repealing the stamp laws, removes all objection<sup>to</sup> to a bond for want of a stamp, and authorizes the appellate court to reverse the decision of an inferior court, refusing to admit the bond in evidence because not stamped, though the repealing act was not passed until *after* such decision was made. *State, use of Mayor & C. C. of Balto., vs. Norwood, et al.*, 195.
2. The stamp laws did not design or profess to confer upon the citizens of the State any private benefits or rights, but operated to impose burdens upon them for State purposes, which the Legislature had full authority to remove at any time, by a repealing act. *Ib.*

## SUBSCRIPTION TO STOCK.

1. The board of directors of a bank passed a resolution directing the books for further subscription of stock to the bank to be opened, under the direction of M. and W., "or either of them, and that five dollars be required on each share, at the time of subscribing." N. proposed to subscribe for one hundred shares of stock, provided M. would undertake to raise the money therefor, upon a note for \$1000, he then held against certain parties, and not then due. To this proposition M. agreed, and, in accordance with this agreement, the subscription was made. HELD:

That, in taking the subscription *in this manner*, M. exceeded the authority conferred upon him by the resolution, and there being no proof that his act was ever *ratified* by the bank, N. is not entitled to a decree, compelling the bank to recognise him as a stockholder. *Farmers & Mechanics Bank of Carroll Co., et al., vs. Nelson*. 35.

2. In a suit in the name of a corporation to recover a subscription to its stock, the plaintiff offered in evidence *letters patent* issued by the Governor of Pennsylvania, creating and erecting certain named subscribers, and also those who shall afterwards subscribe, into a body politic, by the name of "The Wellersburg and West Newton Plank Road Company," with all the privileges incident to a corporation. It was also proved that subscriptions were made by, and certificates of stock issued to, various persons, and the defendant appeared to be a subscriber subsequent to the date of the letters patent, and that the road was constructed, and toll-gates erected, and tolls collected thereon. HELD:

1st. That these facts were *some evidence* that the plaintiff was an incorporated company for the purpose of constructing a *plank road* by means of stock, and that the charter gave *authority* to the company to take subscriptions for stock *after* its date.

2nd. The defendant's contract being a subscription for stock of the company, is a contract which was necessary and usual as means for carrying into effect the purposes of such a charter.

3rd. The letters patent having conferred the power of making such a contract in Pennsylvania, the act of 1834, ch. 89, sanctions the like power in Maryland.

4th. The letters patent sufficiently establish the *corporate existence* of the plaintiff, and the matters set forth and *recited in them* are to be taken as true, until the contrary is proved.

5th. The charter having given authority to take subscriptions, without specifying any *particular manner* in which it shall be done, and the defendant having offered no proof that the *mode adopted* in taking his subscriptions is at variance with any law applicable to the subject, the presumption is, that the contract was valid. *Plank Road Company vs. Young*, 476.

## SURETY AND SURETIES.

2. A mortgage was executed "to indemnify, secure and save harmless"

## SURETY AND SURETIES—Continued.

M., as surety on a *specified note* given by the mortgagor to S., "from all losses by reason of his liability as security aforesaid." This note, after maturity, was placed in bank for collection, and the maker being unable to pay the whole, the bank agreed to, and did, *discount* a new note of the maker for the *balance*, with M. and another, as endorsers. At the time M. put his name to this new note, it was understood by him and the maker, that the money raised on it should be applied to pay the *balance* on the old note due S., which was done, and the old note paid. *Held:*

1st. That the *liability* of M., on the *new note*, was a continuation of the *same liability* as that secured by the mortgage, and this mortgage is a subsisting security therefor, and is entitled to a preference over *subsequent mortgages* of the same property.

2nd. The mortgagor being insolvent, and the mortgaged property having been sold, under a decree in equity, and the proceeds brought into court, M. has the right to have them applied to this debt, though he has not paid the note to the bank. *Markell vs. Eichelberger, Trustee, &c.*, 78.

## TAXES, TAXATION.

1. A ship registered at the custom-house in, and *sailing out* of the port of Baltimore, owned by a *bona fide* and *actual* resident of Baltimore county, having his place of business, as a merchant, in the city, is not liable to pay taxes to the city for municipal purposes. *Hooper vs. Mayor & C. C. of Balto.*, 464.
2. A vessel thus situated is not, within the meaning of the tax law of 1852, ch. 337, "*permanently located elsewhere within the State*" than at the *domicil* of the owner, but is subject to the general rule of the common law that personal property has *no locality* other than that of the *domicil* of the owner. *Ib.*
3. By the laws of congress, the registration district of which Baltimore is the port of entry, is not confined to the limits of Baltimore city, and the fact that a vessel is *registered* at the custom-house in Baltimore, gives to the *city* no more right to tax her than to any other part of the district. *Ib.*
4. Statutes are to be construed in reference to the *principles* of the *common law*; it is not to be presumed, that the legislature intended to make any innovation upon the common law, further than the case absolutely requires, but the law rather infers, that the act did not intend to make any alteration other than what is *specified*, and besides *what has been plainly pronounced*. *Ib.*

*See Clerks, &c., 1, 2.*

## TRESPASS.

1. The owner of cattle is bound to keep them in an enclosure or in custody at *his peril*, for every entry by them on another's possession is a *trespass*, and this principle applies as well to the intrusion of cattle and horses upon the land over which a rail road company is entitled to its franchise as to the property of a private owner. *Balto. & Ohio Rail Road Co. vs. Lamborn.*, 257.

## TRESPASS DE BONIS ASPORTATIS.

1. In an action of trespass *de bonis asportatis*, payment of the judgment against the defendant, confers on him the ownership of the property taken, and therefore the measure of damages is its value at the time of the asportation. *Schindel vs. Schindel*, 108.
2. In such an action the jury may consider any facts and circumstances accompanying and giving color to the trespass, for the purpose of increasing the damages; the motives which induce a tortious act, are always matters for the consideration of the jury. *Ib.*

## TRUST, TRUSTEE AND CESTUI QUE TRUST.

1. A trustee ought not to be subjected to the consequences of a multiplicity of suits, and may avail himself of the objection, without pleading specially, where the subject matter of the defence is presented by the plaintiff himself. *Cockey, Garnishee of Leister, vs. Leister*, 124.
2. A testator bequeathed \$10,000 to a trustee, who was also one of his executors, to be put at interest, or invested in stocks, and to be held *in trust*, to apply the income to the support of the testator's wife *during her life*, and, *after her death*, he gave and bequeathed said sum and the securities in which it may have been invested, to the children of his daughter Mary. He further directed that the power of thus putting at interest, and investing, and of selling and *reinvesting*, as often as the trustee deemed expedient, should be a *continuing* power during the requisite continuance of the trust. The wife renounced the provisions of this will. HELD:
  - 1st. That by such *renunciation* the rights and interests of the *legatees in remainder* were not affected; the estate in remainder was *vested* in such legatees, and the renunciation only struck from the will the bequest to the wife.
  - 2nd. The trust thus created and vested in the trustee, was not limited to the life of the wife, but was a continuing, subsisting trust after her death, for the parties in remainder, and the trustee could only be discharged from his obligation by payment of the fund to them.
  - 3rd. The executor and trustee having, under a mistake as to the effect of this renunciation, settled up the estate, and wrongfully paid this legacy to the residuary legatees, both *he* and *they* are responsible to the *cestuis que trust* therefor, the former *primarily*, and the latter *ultimately*.
  - 4th. Limitation is no bar to this claim, and, under the circumstances of the case, there has been no such lapse of time, or laches and delay in making the claim, nor acquiescence and concurrence in the settlement of the estate and distribution of the fund, as will bar the complainants of their equitable relief.
  - 5th. The parties who wrongfully received the legacy, being bound to refund the same, having taken it *subject to the trust*, and *they*, as well as the trustee, being alive and in court, upon a bill filed by the *cestuis que trust* against *all of them*, the de-

**TRUST, TRUSTEE AND CESTUI QUE TRUST—Continued.**

cree, while providing for payment to the complainants, will also give the trustee relief over against his co-defendants.

6th. The complainants are entitled to *interest* on the principal sum due them for this legacy, from the time the same was wrongfully paid to the residuary legatees, but several payments having been made through a period of years, it should be counted, under the circumstances of the case, only from the date of the *last payment*. *Hanson & Wife, et al., vs. Worthington, et al.*, 418.

3. Where a trust is created by a will in a party who is also executor, the probate of the will, and taking out letters testamentary thereon, by such party, are sufficient evidence of the acceptance of the trust. *Ib.*
4. Where a party has once fixed himself by any means with the acceptance of a trust, he cannot afterwards, by *disclaimer*, renounce or repudiate the duties and responsibilities of the office. *Ib.*
5. Where the subject of a trust is *personal estate*, the whole legal interest is in general vested in the trustee by a gift, without any words of limitation, and will continue in him till divested by a legal transfer or assignment. *Ib.*
6. Where a party is *sole* executor, and also a trustee, the fund will, by operation of law, be considered in his hands *as trustee*, after the time limited for the settlement of the estate, and where there are two executors, and one dies, the same principle applies to the *survivor*. *Ib.*
7. A release discharging an executor from the sums due to the parties releasing, as residuary legatees, cannot operate to discharge him from his liability as trustee for a specific legacy bequeathed to him in trust for the benefit of the same parties executing the release. *Ib.*

*See WILL AND TESTAMENT, 1.*

**PRACTICE, 5.**

**ATTACHMENT, 3 to 5.**

**VERDICT.**

1. In a trial on an indictment for murder, a verdict simply of "guilty," is insufficient, because, by the act of 1809, ch. 138, sec. 3, the jury must ascertain in their verdict the degree of the crime, whether it be murder in the first or second degree. *Ford vs. The State*, 514.
2. Jurors cannot testify in relation to the motives upon which they joined in the verdict; if, through mistake or partiality, they deliver an improper verdict, the court may, *before it is recorded*, desire them to reconsider it, but the jury cannot be allowed to make any alteration *after* the verdict is recorded. *Ib.*
3. After the foreman, *speaking for the whole panel*, finds a proper verdict, which is *recorded*, and the whole panel is called on to

## VERDICT—Continued.

- hearken to it* as the court hath recorded it, and they have so *hearkened to it*, no objection being made by any juror, or the counsel for the State or prisoner, such verdict is the *verdict of the whole panel*, and it is then *too late* for any of the jury to alter or amend it, and also too late to *poll* the panel. *Ib.*
4. The object of a *poll* is to call on *each* juror to answer for himself, and in his *own language*, and where, in a trial for murder, the verdict was simply “*guilty*,” and on being polled, the *foreman alone* answered “*guilty of murder in the first degree*,” and *each* of the *others* answered “*guilty*,” *without specifying the degree in words*, such verdict is *insufficient*, because at *no time* did *all* the jury find the prisoner “*guilty of murder in the first degree*.” *Ib.*
  5. By the Bill of Rights of this State, *every man* has the right to “*a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty; unanimity is indispensable to the sufficiency of a verdict*. *Ib.*
  6. Where the judge of an inferior court, in his decision, embodied in the transcript of the record sent to the appellate court, sets forth the facts occurring upon the rendition of a verdict in a trial for murder, and these facts show that all the jury did not at any time find the prisoner “*guilty of murder in the first degree*,” the judgment of the court, upon such verdict, sentencing the prisoner to be hanged, may be reviewed by the appellate court on writ of error, notwithstanding the docket entries of the court below, both original and as extended in the transcript, show a verdict in due form, of “*guilty of murder in the first degree*.” *Ib.*
  7. In such a case, the appellate court may look to the misprision of the clerk, who is but the hand of the court, and whose duty it is, in contemplation of law, to record nothing but the proceedings of the court. *Ib.*
  8. Where there has been, in the eye of the law, no valid and sufficient *verdict* there must be a *new trial*; in such a case there is a *mistrial*, and the indictment being good, the prisoner may be tried anew on the same indictment. *Ib.*

*See FORMER RECOVERY*, 1.

*BILLS OF EXCHANGE, &c., 3.*

## WAIVER.

*See PRACTICE*, 13.

## WARRANTY.

*See FORMER RECOVERY*, 3.

*SALES*, 2.

*INSURANCE*, 9, 10, 11, 12.

## WASTE.

1. A Court of Equity will, upon a bill filed by the *mortgagee*, either *before* or *after default made by the mortgagor*, *intervene by injunction to prevent waste or destruction*, by the *mortgagor* in possession,

**WASTE—Continued.**

of the mortgaged property, whether real or personal. *Parsons vs. Hughes*, 1.

**WIDOW.**

*See WILL AND TESTAMENT*, 7.

**WILL, CONSTRUCTION OF, &c.**

1. A testator, by *apt words*, devises a tract of land in *fee*, then "leaves" all his personal estate, except negroes, to be disposed of by *his executor*, and the *residue of his real estate* "to be rented out yearly," directs his house to be repaired by *his executor* "from the income of his real and personal estate," manumits his negroes, Beckey and Elizabeth Ellen, and directs others to be hired out for a term of years, and then set free, and then "leaves Beckey and her children a reasonable support, to be given by *his executor* from the *income of his real and personal estate*, during her life, and at her death" he gives "to Elizabeth Ellen *all the income of his whole estate, real and personal, to her and her heirs forever, to be paid over yearly by his executor*; but if there should be any among them not able to take care of themselves, they are to have a support." He then appoints his *executor*, and gives him a legacy of \$100 "and ten per cent. on all money received by him and his heirs forever." *HELD:*

That under this will, the *legal title* to the residue of the testator's real estate passed to the *executor*, who took therein a *trust by implication* for the benefit of the manumitted negroes, and such a devise does not contravene the *policy* of the laws of this State, in regard to free negroes. *Brown, et al's Lessee vs. Brown*, 87.

2. By an *ante-nuptial agreement*, a wife was empowered to dispose of certain real and personal property, by will, and to hold and receive certain funds for her sole and separate use. *HELD*, That the orphans court were right in admitting her will to probate, as valid to pass real and personal estate, its form and attestation being sufficient, but were not required to decide what extent of property would pass under the will. *Michael vs. Baker, Exc'z of Michael*, 158.
3. The orphans courts are courts of limited jurisdiction: they may take probate of wills disposing of real and personal estate, and where the will of a *married woman* is propounded for probate, the probate does not decide upon the *right of disposal*, but merely upon the *factum* of the instrument. *Ib.*
4. Where the will of a *married woman* having, by an *ante-nuptial agreement*, power to dispose of property by will, is offered for probate, the orphans court will not look nicely into the power of the wife; the question whether the will is a sufficient execution of the power belongs to the courts of law and equity, and not to the orphans court. *Ib.*
5. Where a wife under an *ante-nuptial agreement*, is entitled to receive and hold certain funds to her sole and separate use free from the marital rights of her husband, such funds will pass by

## WILL, CONSTRUCTION OF, &amp;c—Continued.

her will, though the power of disposing of them may not be expressly conferred upon her by the agreement. *Ib.*

6. An *ante-nuptial* agreement, giving to the wife power to dispose of certain real and personal property by will, is not a testamentary paper, forms no part of her will and should not be admitted to probate. *Ib.*
7. A testator bequeathed \$10,000 to a trustee, who was also one of his executors, to be put at interest, or invested in stocks, and to be held in trust, to apply the income to the support of the testator's wife during her life, and, after her death, he gave and bequeathed said sum and the securities in which it may have been invested, to the children of his daughter Mary. He further directed that the power of thus putting at interest, and investing, and of selling and reinvesting, as often as the trustee deemed expedient, should be a continuing power during the requisite continuance of the trust. The wife renounced the provisions of this will. *HELD:*
  - 1st. That by such renunciation the rights and interests of the legatees in remainder were not affected; the estate in remainder was vested in such legatees, and the renunciation only struck from the will the bequest to the wife.
  - 2nd. The trust thus created and vested in the trustee, was not limited to the life of the wife, but was a continuing, subsisting trust after her death for the parties in remainder, and the trustee could only be discharged from his obligation by payment of the fund to them. *Hanson & Wife, et al., vs. Washington, et al.*, 418.

## WITNESS.

1. Two parties *jointly liable* on a contract were sued, and one of them was taken and the other returned *non est*: *HELD*, that the *latter* was a competent witness for the *plaintiff*, to prove the terms of the contract. *Baugher & Orendorff vs. Culler*, 6.

*See NEGROES AND SLAVES*, 5.

*Ex. f. A.C.*

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